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No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1997

JAMES W. CILECEK, M.D.,
Petitioner,

v.

INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS of NORTHERN VIRGINIA, Ltd. and THOM A. MAYER, M.D.

Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fourth Circuit, in conflict with decisions of this Court and recent decisions of the Ninth and Eleventh Circuits, erred in holding that, because an emergency room physician had agreed to be labeled an "independent contractor," he was not an employee protected by Title VII, even though the hospital exercised control over his activities identical to the control it exercised over physicians it called "employees."

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James W. Cilecek, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A1 - A21) is reported at 115 F.3d 256. The district court's decision from the bench (App., *infra*, A27 - A28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1997. App., *infra*, A22 - A23. A timely petition for rehearing was denied on August 5, 1997. *Id.* at A24 - A25. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Title VII defines "employer" as: "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." *Id.* § 2000e(b). Title VII defines "employee" as: "an individual employed by an employer . . . ." *Id.* § 2000e(f).

STATEMENT OF THE CASE

1. For more than ten years, Dr. James Cilecek worked full time as an emergency room physician at two facilities owned by Inova Health Systems Services, Fairfax Hospital and ACCESS of Reston. App., *infra*, at A2 - A3. He was a house physician on the staff. *Id.* at A16. He had no private

practice; he treated only hospital patients, in hospital facilities, using hospital equipment. *Id.* at A16 - A17, A20. Under the hospital's by-laws, he and all other emergency room doctors were required to perform their responsibilities "at the direction and under the supervision of the chairman of the clinical department to which the individual has been assigned." *Id.* at A17. The chairman of the Department of Emergency Medicine, Dr. Thom Mayer, had the power to enforce the compliance of all emergency room doctors with the hospital's rules and regulations through supervision, suspension, and even termination. *Id.*

2. Since 1989, respondent Emergency Physicians of Northern Virginia ("Emergency Physicians") has supplied emergency room physicians to Inova. App., *infra*, A2. Dr. Mayer, chairman of Emergency Medicine at the hospital, is also the president and sole owner of Emergency Physicians. After Emergency Physicians' entry on the scene, Dr. Cilecek continued to work at the hospital and for ACCESS. *Id.* The terms and conditions of his responsibilities remained the same, but Emergency Physicians now provided his paycheck and malpractice insurance. *Id.* at A17. He agreed to be called an "independent contractor," and he paid his own Social Security and estimated taxes. For most of his tenure at Inova, and for a full two years immediately preceding his termination in October 1994, Dr. Cilecek worked full time and exclusively for Inova. *Id.* at A3.

3. While some Inova emergency room doctors are called employees and others are called "independent contractors," they all do the same work, are subject to the same rules and regulations, and attend the same meetings. App., *infra*, A20. All,

including Dr. Cilecek, report to and are controlled and supervised by Dr. Mayer, whose only office is in the hospital. *Id.* at A19 - A20. All emergency room doctors, including Dr. Cilecek, submit proposed work schedules, which are either approved or altered by the hospital. *Id.* at A20. Dr. Cilecek attested that no differentiation among doctors exists in the workplace in standards, supervision, or work performed. *Id.* at A19 - A20.

4. By early 1994, it was common knowledge among Inova workers that a former employee had brought Title VII claims of discrimination, harassment, and retaliation against Inova. J.A. at 141.[1] In February 1994, Dr. Mayer warned Dr. Cilecek not to help anyone complaining about Inova. J.A. 141 ¶ 13. In early July 1994, Dr. Cilecek executed an affidavit for the plaintiff in the Title VII suit. J.A. 142 ¶ 14, 153-56. Within weeks, Dr. Cilecek received a subpoena for a deposition by Inova and received notice that the hours in his schedule for the upcoming month had been cut. App., *infra*, at A4. When Dr. Cilecek protested the cut, Dr. Mayer fired him. *Id.*

5. On October 12, 1995, Dr. Cilecek filed suit against the hospital and Emergency Physicians in the United States District Court for the Eastern District of Virginia.[2] App., *infra*, A4. The complaint alleged wrongful retaliatory discharge in violation of Title VII. *Id.* at A4 - A5.

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1 "J.A." refers to the Joint Appendix that was filed in the Fourth Circuit.

2 The district court's jurisdiction rested on 28 U.S.C. § 1331.

The defendants moved for summary judgment, which the district court granted without permitting Dr. Cilecek any discovery. The court's ruling was based on its determination that Dr. Cilecek was an independent contractor rather than an employee, and therefore not protected by Title VII. App., *infra*, at A27 - A28, A5 - A6. Dr. Cilecek argued that he was an employee of the hospital or of Emergency Physicians, or of both as joint employers. In ruling from the bench, the district court relied primarily on the fact that all parties had referred to Dr. Cilecek as an independent contractor, and that he was treated as such for tax purposes.

6. The United States Court of Appeals for the Fourth Circuit affirmed. App., *infra*, at A15.[3] A divided panel held that whether Dr. Cilecek was an "independent contractor" or an "employee" was a question of law. *Id.* at A11. The panel recognized that under this Court's long established standard, employed uniformly by other circuits, the distinction between employee and independent contractor "rests on the degree of control exercised by the hiring party" (*Id.* at A9), but viewed it as "less productive to debate the control over the discharge of professional services in the medical context" than in other contexts. *Id.*

Thus, dismissing this Court's test for determining employment status, the majority selected certain factors that it viewed as "core incidents to a work relationship that are inconsistent with employee status," while recognizing that other factors in the record "indicat[ed] otherwise." *Id.* at A11 - A12. Its

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[3] The jurisdiction of the court of appeals rested on 28 U.S.C. § 1291.

calculus did not mention that Dr. Cilecek had no independent business of his own, but only worked doing the business of the hospital, nor did it address the evidence that on the job, Dr. Cilecek did exactly the same work as and was indistinguishable from any other emergency room physician, whether "employee" or "independent contractor." *Id.* at A19 - A20. (Murnaghan, J., *dissenting.*) Refusing to apply the test that would have prevented summary judgment on this fact-disputed record, the court instead employed a new legal standard: the majority deemed "important to [its] conclusion" that the parties had agreed that Dr. Cilecek would be an "independent contractor." *Id.* at A14.

Judge Murnaghan dissented. He protested that the governing legal standard dictates that the agreement of the parties "cannot overcome the actual facts," which were that Dr. Cilecek worked essentially full time, at a set hourly rate, and that Emergency Physicians would pay him and supply his malpractice insurance. App., *infra,* at A17. While using the wrong legal standard, the majority had "usurp[ed] the role of the factfinder and resolve[d] disputed factual issues" in the hospital's favor. *Id.* at A21. Judge Murnaghan examined all of the factors identified by this Court and other courts as determinative of employment relationship, and he concluded that "[a] majority of those factors points to Dr. Cilecek as an employee." *Id.* at A19.

7. Dr. Cilecek petitioned for a rehearing en banc on June 14, 1997. On August 5, 1997, the Fourth Circuit denied the petition. The United States and the Equal Employment Opportunity Commission as *amicus curiae* supported Dr. Cilecek's position both on appeal and on rehearing. They argued that the panel's

creation of a new Title VII exclusion in the medical context "improperly narrows the reach of Title VII," and "frustrate[s] Congress's remedial purpose in enacting Title VII to protect workers from discrimination." (Amicus Brief on Rehearing at 7.)

REASONS FOR GRANTING THE PETITION

Introduction

The Fourth Circuit has held that, because the hospital and Dr. Cilecek agreed that he would be called, and treated for tax purposes as, an "independent contractor," he was not an "employee" protected by Title VII. In giving virtually conclusive weight to that agreement between the parties, the decision conflicts squarely with recent decisions of the Ninth and Eleventh Circuits, which held that a contractual arrangement structured to avoid creating an employment relationship will not overcome the realities of the workplace.

The majority ignored or transfigured the factor that this Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), treated as the most significant indicator of employee status: "the hiring party's right to control the manner and means by which the [work] is accomplished." *Id.* at 323. The majority compounded its error by usurping the province of the jury in granting summary judgment, and, even more egregious, did so without permitting any discovery. This too is in conflict with other circuits, which have held that the fact-intensive question of employment relationship is inappropriate for summary judgment.

As the United States and the EEOC forcefully argued in support of Dr. Cilecek's petition for rehearing, this case is one of "exceptional importance." (Amicus Brief on Rehearing at 1.) The majority's decision, said the United States, "improperly narrows the reach of Title VII and permits employers to avoid their Title VII responsibility for certain employment functions, such as payroll and shift scheduling, while retaining actual direction and control of the employees' work." *Id.* at 7. The government also stressed in its earlier brief on appeal that because the term "employee" is common to so many statutes, a decision to affirm the district court would reach far beyond the boundaries of Title VII. (Amicus Brief on Appeal at 17.) This case thus presents an issue of great public importance. For that reason, and because the decision is in conflict with those of other circuits, this Court's review is warranted.

I. THE MAJORITY'S DECISION GIVING DECISIVE WEIGHT TO THE PARTIES' AGREEMENT CONFLICTS WITH RECENT DECISIONS OF THE NINTH AND ELEVENTH CIRCUITS, WHICH PROPERLY OBSERVE THIS COURT'S RULE REJECTING LABELS AS DETERMINATIVE OF EMPLOYMENT STATUS

This Court has long held that in determining who is an "employee" under a variety of federal statutes, the courts must examine what work is actually done and how it is controlled. Merely labeling a worker "independent contractor" will not suffice. "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the

protection of the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). [4] In *Rutherford Food Corp.*, the Court was interpreting the term "employee" under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*, which, like Title VII and other federal statutes, defines "employee" in a circular fashion as "an individual employed by an employer."

Courts have routinely followed this Court's directive to look beyond labels to the actual realities of the workplace. In fact, the Ninth and Eleventh Circuits, interpreting the same statutory term, have recently held that even a clear contractual agreement to establish an "independent contractor" status will not overcome the realities of the workplace. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) ("employee" under the Employee Retirement Income Security Act of 1974 ("ERISA")), and *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256 (11th Cir. 1997) ("employee" under the Age Discrimination in Employment Act (ADEA)). As Judge Murnaghan noted in dissent in the Fourth Circuit, the agreement between the parties that the doctor be "deemed an independent contractor . . . cannot overcome the actual facts." App. at A17.

Over the past fifty years, this Court has construed the term "employee" under many federal social welfare statutes sharing the common circular definition.[5] Most recently, in *Nationwide Mutual*

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[4] *See Hishon v King & Spalding*, 467 U.S. 69, 80 n.2 (1984) (Powell, J., concurring) (". . . an employer may not evade the strictures of Title VII simply by labeling its employees 'partners'").

[5] *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 323 (meaning of "employee" under Employee Retirement Income Security Act); *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 321-26 (1974)

Insurance Co. v. Darden, this Court interpreted the meaning of "employee" under ERISA. 503 U.S. at 323. In *Darden*, this Court held that where a federal statute does not define the term "employee," courts should presume the term to incorporate traditional common law principles of agency, under which control is the key factor. *Id.* This Court explained that "'[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.'" *Id.*, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).[6] Although this Court has recently addressed related issues under Title VII,[7] it has never construed the term "employee" for purposes of Title VII. Many courts have, however, looked to the *Darden* decision to

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(same under the Federal Employers Liability Act); *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968) (same under the National Labor Relations Act, as amended); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-30 (1947) (same under the Fair Labor Standards Act).

6 The Court also listed twelve other factors to consider, no one of which is determinative; all of those factors except tax treatment militate in favor of Dr. Cilecek's "employee" status. *Nationwide Mut. Ins. Co.*, 503 U.S. at 323-24. *See infra*, at n.11.

7 This Court addressed two related issues in the 1996 term. In *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), this Court held that the term "employees," as used in § 704(a) of Title VII, includes former employees, and in *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660 (1997), this Court held that under § 2000e(b) of Title VII, which defines an employer as one who has fifteen or more employees for each working day for twenty or more weeks during the calendar year, the crucial factor is whether or not the employer has employment relationships with 15 or more individuals and not whether 15 or more individuals merely appear on the payroll.

analyze an individual's status under Title VII. *See, e.g., Lambertsen v. Utah Dep't of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996).

The Fourth Circuit majority misinterpreted *Darden*, in conflict with the decisions of other courts of appeals. It held that the parties' agreement that Dr. Cilecek would be called an "independent contractor," and would pay his taxes accordingly, meant that he was not an "employee" for purposes of Title VII, even though he performed on the job and was supervised and controlled in the same way as the so-called "employee" emergency room physicians. In so doing, the Fourth Circuit turned the *Darden* test on its head and set dangerous precedent that will have significant negative implications for the increasing number of professionals who, like Dr. Cilecek, might be labeled "independent contractors," but are, as a matter of workplace reality, "employees."

In contrast, the 9th and 11th Circuits have recently held that such an agreement between the parties will not control when the workers function like employees. *See Vizcaino v. Microsoft Corp., supra* and *Garcia v. Copenhaver, Bell & Assocs., supra*. The Eleventh Circuit case, brought under the Age Discrimination in Employment Act, a sister statute of Title VII, also involved an emergency room doctor who, like Dr. Cilecek, worked for a corporate provider of hospital emergency room physicians. The contract between the doctor and the corporation explicitly provided that the doctor was to perform his duties "as ***an independent contractor and not as an employee***," and that nothing in the contract should "be construed to create" any "relationship between the parties ***other than an independent contractor relationship***." *Garcia v.*

Copenhaver, Bell & Assocs., 104 F.3d at 1258 (emphasis in original). Under the contract, the corporation was to exercise no control over the means or manner in which the doctor performed his duties, which were to be performed in accordance with his "independent medical judgment." *Id.*

Notwithstanding this very explicit agreement between the parties *not* to create an employment relationship, the Eleventh Circuit held that the question of whether the doctor was an employee must be submitted to the jury. The contract, explicit as it was, was not dispositive of the employment relationship question. *Id.*

The Ninth Circuit, sitting en banc, has also held, directly contrary to the Fourth Circuit, that an agreement between the parties to call workers "independent contractors" does not render them non-employees. In *Vizcaino v. Microsoft Corp., supra*, an ERISA case, the court held that Microsoft workers who had signed contracts defining them as "independent contractors" and not "employees" were nonetheless employees under the law. They "did not give up or waive their rights to be treated like all other employees under the [company's pension and welfare] plans." *Vizcaino v. Microsoft Corp.*, 120 F.3d at 1011-12. Despite the contract designation as "independent contractor," the explicit intention *not* to create an employment relationship, and the fact that Microsoft plaintiffs were responsible for their own taxes and benefits, Microsoft had "fully integrated [the plaintiffs] into its workforce," treating them in reality like employees. *Id.* at 1008. As a result of this treatment, the plaintiffs had to be regarded as employees under the statute.

These two cases are in accord with many decisions of this Court and the courts of appeals holding that the label given to the hired party is not controlling.[8] Some courts have even held that the label is meaningless. *See, e.g., Eastern Inv. Corp. v. United States*, 49 F.3d 651, 655 (10th Cir. 1995) ("the law is clear that Lowen's classification of a salesperson as employee or independent contractor is of no consequence . . ."). This is because the label given to the hired party "does little to illuminate the actual nature of [the]

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[8] *See Rutherford Food Corp. v. McComb*, 331 U.S. at 729 ("[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act"); *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 232 (2d Cir. 1995) ("the employment status of an individual for the purposes of ERISA is not determined solely by the label used in the contract between the parties"); *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) (status of "employee" under FLSA depends on totality of circumstances "rather than on any technical label"), *cert. denied*, 507 U.S. 928 (1993); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81 (8th Cir. 1996) ("The actual duties and role of the individual govern [whether an individual is an "employee" under Title VII]. An employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship."), *cert. denied*, 117 S. Ct. 1694 (1997); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) ("[t]he employment status of an individual for the purposes of ERISA is not determined by the label used in the contract between the parties"); *see also Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("an employer's self-serving label of workers as independent contractors is not controlling . . ."); *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982) ("[a] determination of whether an individual is an employee and therefore covered by the protections in ADEA should not center on the label which the organization has chosen to give to the position"), *cert. denied*, 464 U.S. 819 (1983).

employment relationship . . . ." *Simpson v. Ernst & Young*, 100 F.3d 436, 439 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1862 (1997). In a variety of contexts, this Court and the courts of appeals have recognized that if weight were placed on what a worker is called and how he pays his taxes, a company could easily circumvent the requirements of Title VII and other federal remedial and revenue statutes by labeling its workers something other than "employees." As the United States and the EEOC explained in their Amicus Brief, civil rights statutes such as Title VII "are remedial in nature and should be construed broadly to effectuate their statutory purposes." (Amicus Brief on Appeal at 16-17, citations omitted.) An artificial constriction of the definition of "employee" violates that principle. Indeed, this Court recently construed the term "employees" as used in § 704(a) of Title VII broadly to include former as well as current employees. *See Robinson v. Shell Oil Co.* 117 S. Ct. 843 (1997).

Thus, the actual incidents of the working relationship, and not the label given to the hired party, determine the party's status; a party cannot even waive the protection provided by federal remedial statutes merely by agreeing to be called an "independent contractor." *Vizcaino v. Microsoft Corp., supra; Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) ("an employee's rights under Title VII may not be waived prospectively"); *see also Mukhtar v. Castleton Service Corp.*, 920 F. Supp. 934, 938 (S.D. Ind. 1996) ("parties cannot agree to waive otherwise applicable protection provided by acts of Congress" and "even though the parties may have labelled their relationship in one way, their labels do not control if enough of the indicia of an employment relationship are present").

The Fourth Circuit's emphasis on the parties' "mutual intent to create an independent contractor relationship" as the first of the "most relevant" factors (App. at A15, A11), is contrary to settled law that these rights may not be waived. Such an intent, far more clearly established in the *Microsoft* and *Garcia* cases than in the instant case, was rejected by the Ninth and Eleventh Circuits, respectively, when the workplace realities showed an employment relationship.

A corollary of the argument that labels are not determinative is that all relevant factors must be examined and weighed, and that this fact-intensive task belongs to the jury. Most courts have treated the employment relationship question as the Eleventh Circuit did in *Garcia v. Copenhaver, Bell & Assocs., supra,* ruling that the question requires weighing and sifting many factors, and is simply not appropriate for summary judgment.[9] The decision below directly conflicts with those numerous decisions.

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9 In *Garcia v. Copenhaver, Bell & Assocs., supra,* the 11th Circuit reversed the district court's decision to dismiss plaintiff's complaint for lack of subject matter jurisidiction where the facts concerning whether or not defendant was "employer" was an element of plaintiff's ADEA claim and there were disputed facts about whether plaintiff was "employee" of defendant. *See also Mallare v. St. Luke's Hosp.,* 699 F. Supp. 1127 (E.D. Pa. 1988) (whether doctor in medical residency program was an employee of the hospital was not a matter for summary judgment where there were facts that both supported and weighed against finding an employment relationship); *Sharkey v. Ultramar Energy Ltd., supra* (court reversed district court's decision to grant defendants' motions for summary judgment where employment status of individual for purposes of ERISA is fact intensive inquiry, not determined solely by label used in contract and could not be properly determined on summary judgment); *Gonzalez v. Trinity*

The majority compounded its error by granting summary judgment before Dr. Cilecek had the opportunity to obtain any discovery. Were summary judgment ever appropriate on the question of employment relationship, it is well established in many circuits that "granting summary judgment prior to the completion of all discovery is inappropriate."[10] Here, Dr. Cilecek had sought discovery, but he had not obtained any responses.

Marine Group, Inc., 117 F.3d 894, 899 (5th Cir. 1997) (in denying plaintiff's motion for summary judgment on issue of whether plaintiff was "employee" within the meaning of Title VII, district court explained that the determination "'requires a factual analysis of often conflicting allegations'" and therefore the "'issue is not amenable to summary judgment at this time'"); *Folkerson v. Circus Circus Enters., Inc.*, No. 93-17158, 1995 U.S. App. LEXIS 30137 (9th Cir. Oct. 16, 1995) (district court improperly granted summary judgment for defendant on plaintiff's Title VII claim on ground plaintiff was independent contractor where evidence indicated defendant exercised control over plaintiff's work); *Daughtrey v. Honeywell, Inc.*, 3 F.3d at 1493 (reversed district court decision to grant summary judgment for defendants on plaintiff's ERISA claim where facts were disputed on pivotal issue of degree of control exercised by Honeywell over plaintiff).

[10] *Phillips v. General Motors Corp.*, 17 Fed. R. Serv. 3d (Callaghan) 962, 968 (4th Cir. 1990); *see also Vance ex rel. Hammons v. United States*, 90 F.3d 1145 (6th Cir. 1996) (reversing district court decision to grant summary judgment where nonmovant did not have the opportunity to complete discovery); *Kachmar v. Sungard Data Sys.*, 109 F.3d 173 (3d Cir. 1997) (vacating district court decision to grant summary judgment in Title VII case where nonmovant did not have the opportunity to complete discovery); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372 (2d Cir. 1995) (vacating district court decision to grant summary judgment where nonmovant did not have ample opportunity for discovery); *Snook v. Trust Co. Bank, N.A.*, 859 F.2d 865 (11th Cir. 1988) (same).

Even if the panel were correct to decide the employment relationship question, rather than submitting it to a jury, the panel was obligated to weigh *all* of the relevant factors and, of course, to read them in the light most favorable to the plaintiff. *See, e.g., Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993) (reversing decision to grant summary judgment in favor of defendant on ADEA claim for failing to examine all factors concerning the "employment" relationship). Instead, as Judge Murnaghan pointed out in dissent, the panel "resolve[d] disputed factual issues" against Dr. Cilecek, making summary judgment "inappropriate and ill advised." App. at A21. The panel arrogated to itself the jury's fact finding and weighing function, and, in doing so, violated the well-established principle that all permissible inferences must be weighed in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1968).

The circuit courts agree in the wake of *Darden* that the most important factor in the analysis of the working relationship is the degree of control exercised by the hiring party over the hired party.[11] The panel

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[11] *See Frankel v. Bally, Inc.*, 987 F.2d at 90 (the most significant factor in determination of whether individual is "employee" or "independent contractor" is the hiring party's right to control the manner and means by which the work is accomplished); *Simpson v. Ernst & Young*, 100 F.3d at 442 (*Darden* "defines the underlying common denominator of the employer/employee rubric as the employer's ability to control job performance and employment opportunities of the aggrieved individual as the most important of many elements to be evaluated . . ."); *Loomis Cabinet Co. v. Occupational Safety & Health Review Comm'n*, 20 F.3d 938, 942 (9th Cir. 1994) (under *Darden* the "central inquiry is: who controls the work environment"); *Lambertsen v. Utah Dep't of Corrections*, 79 F.3d at 1027 ("the critical feature which defines the employer-

majority paid lip service to that factor, but it simply chose to emphasize instead the parties' intention "to establish an independent contractor relationship." App. at A14 - A15. Indeed, but for the tax treatment, *all* of the other factors that this Court set forth in *Darden* as relevant to the employment relationship question demonstrate that Dr. Cilecek was an employee.[12]

Finally, the Fourth Circuit majority minimized the important factor of workplace control by suggesting, without record support, a new rule for reviewing the degree of control in a medical setting. Contrary to the Eleventh Circuit's approach in *Garcia v. Copenhaver, Bell & Assocs., supra*, it took what amounted to judicial notice of a supposed tension in the medical setting between the hospital and the doctor, declaring that "it is less productive to debate the control over the discharge of professional services in the medical context than it might be in other service relationships." App. at A9.

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employee relationship between plaintiff and defendant . . . is control"); *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d at 1266 ("the central issue . . . is the 'hiring party's right to control the manner and means by which the [work] is accomplished'") (quoting *Daughtrey v. Honeywell, Inc.*, 3 F.3d at 1495-96, citing *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751).

12 The record clearly shows the following: all emergency room doctors had the same skills and did the same work; all work was done in the hospital, doing the hospital's regular business, with the hospital's tools, equipment, personnel, and patients; the relationship was of ten years' duration; the doctor was paid by the hour, not by the job; and he received malpractice insurance. He could not work when and as he pleased, but rather had to work at least 100 and up to 180 hours per month, depending on the hospital's needs. App. at A2 - A3; A16 - A17; A19 - A20.

The Fourth Circuit reasoned that it was appropriate to ignore the hospital's pervasive workplace control because the hospital had to exercise control over all physicians on its staff in order to avoid exposing itself to liability. App. at A9. That analysis, however, missed the point: the fact that employers have the need to exercise more control over their employees than over independent contractors is precisely why courts consider *control* to be evidence of an employment relationship.

The Fourth Circuit created what amounts to a new rule that doctors, and perhaps other professionals, should be subject to more stringent standards for purposes of determining whether they are entitled to protection under Title VII. This new rule is a radical departure from established jurisprudence, for no court has held professionals to a more stringent standard of eligibility for protection under federal remedial statutes. *See Simpson v. Ernst & Young*, 100 F.3d at 443 (Sixth Circuit applied the same common law test emphasizing evidence of control and held that despite being labeled a "partner," plaintiff was an "employee" for purposes of ERISA and the ADEA) and *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d at 1267 (Eleventh Circuit focused on control defendant exercised over plaintiff, an emergency physician). Indeed, there is no justification for doing so.

The Fourth Circuit offered no legal authority or other compelling policy reason to support its decision that those who hire certain professionals should be immune from liability under Title VII and other federal remedial statutes. Without further guidance from this Court, professionals in particular are at a great risk of

being denied the protection to which they are entitled under federal legislation.

II. THE MAJORITY'S DECISION WOULD ELIMINATE REMEDIES FOR LARGE NUMBERS OF WORKERS HERETOFORE PROTECTED BY A VARIETY OF FEDERAL STATUTES

In addition to the enforcement of Title VII, at issue here, the decision of the court below will affect the reach and enforcement of a number of other statutes that rely on the common law definition of employee.[13] This Court has held consistently that the determination as to whether one is an employee under such statutes is made according to common law principles and "must be based on an examination of the totality of the circumstances." *Nationwide Mut. Ins. Co.*, 503 U.S. at 322-24; *see, e.g., Simpson v. Ernst & Young, supra,* (nominal "partner" held to be an "employee" under the ADEA because he had no meaningful participation in the ownership or control of the business); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961) (members of a cooperative were employees for

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[13] These include the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*, the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*, and the Internal Revenue Code, 26 U.S.C. §§ 1 *et seq.*

purposes of the FLSA because they functioned in the work place and were paid like employees).[14]

In addition to the adverse impact on the enforcement of these statutes, the Fourth Circuit's decision is likely to affect the administration of the Internal Revenue Code. The Code explicitly references the common law definition of "employee,"[15] which is crucial to the Internal Revenue Service's determination of an employer's responsibility for withholding taxes under Federal Insurance Contribution Act and other types of employer duties. *See* Rev. Rul. 87-41, 1987-1 C.B. 296. For tax purposes, as with all of the remedial statutes cited above, whether a person is an employee or an independent contractor is a question of fact and is decided only after consideration of all of the particular circumstances of each case. *Ravel v. Commissioner*, 26 T.C.M. (CCH) 885 (1967).[16] Accordingly, the presence or absence of labels is not decisive. *Id.* The Fourth Circuit's decision would invite employers to classify

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14 *See generally* Lewis Maltby & David Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C.L.Rev. 239.

15 The Internal Revenue Code provides that the term "employee" includes "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 U.S.C. § 3121(d)(2).

16 In pertinent part, Treas. Reg. § 31.3401(c)-1 provides that an employer-employee relationship "exist[s] when the person for whom services are performed has the right to control and direct the individual who performs the services." *Id.* at (b). The IRS also examines whether the person possessing control has the right to discharge the hired individual, furnishes the tools, or provides a workplace. *Id.*

workers as "independent contractors" and thus avoid their withholding and other tax responsibilities under federal law.

The IRS has enumerated detailed factors, quite consistent with the common law factors considered by courts, for determining whether doctors are employees. For physicians practicing at a hospital, the IRS considers whether the physician has a private practice, is paid a wage, is provided supplies and support, is regulated/controlled by the hospital, works specified hours, wears a hospital uniform, has his or her services billed by the hospital, and splits fees with the hospital. Under this analysis, Dr. Cilecek would clearly qualify as an employee.[17]

In applying the IRS analysis, the court in *Dutch Square Medical Center Ltd. Partnership v. United States,*

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[17] In pertinent part, Ann. 92-83, 1992-22 I.R.B. 59, at 333.7(5) provides:

(a) The physician does not have a private practice.
(b) Hospital pays straight wage to physician.
(c) Hospital provides supplies and professional support staff.
(d) Hospital bills for physician services.
(e) Percentage division of physician fees with the hospital or vice versa.
(f) Hospital regulation of, or right to control physician.
(g) Physician on-duty at hospital during specified hours.
(h) Physician's uniform bearing hospital name or insignia.
(i) There are, of course, other factors that may indicate an employment relationship.

See also Rev. Rul. 61-178, 1961-2 C.B. 153 (physician integrated into hospital workforce deemed employee); Rev. Rul. 66-274, 1966-2 C.B. 446 (same).

94-2 U.S. Tax Cas. (CCH) ¶ 50,490, (D.S.C. 1994), upheld the IRS's determination that a medical director of an emergency medical care facility, though designated by contract as an "independent contractor," was an employee. The court analyzed in detail the common law and case law factors, and concluded that the doctor was fully integrated into the hospital work force with a "substantial amount of authority," and was its employee. *See also Idaho Ambucare Ctr., Inc. v. United States,* 57 F.3d 752 (9th Cir. 1995) (holding that two doctors were employees, one of the hospital, and the other of a professional corporation); *James v. Commissioner,* 25 T.C. 1296, 1301 (1956) (holding that a hospital pathologist was an employee because he was subject to the "general control of the hospitals" over his work and the "controls over his method of working" required by his profession).

Finally, it must be noted that the Fourth Circuit's constriction of the class of persons covered by Title VII will, in today's workplace, likely be most detrimental to workers most in need of the statute's protections. As the government noted in its *amicus* brief below, "increasingly, employers rely on persons who are labeled 'contractors' to accomplish tasks previously performed by full-time employees," and that "misclassification of employees as 'independent contractors' is a widespread occurrence." (Amicus Brief on Appeal at 20, n.17.) Furthermore, the Fourth Circuit's decision threatens to destabilize working relationships between health care professionals and their employers, thereby adversely affecting the people they serve.

During the last decade, increased economic competition has led American business to restructure

its relationship to workers. Indeed a "contingent workforce" composed of part-time workers, temporary workers, independent contractors, and workers employed by contractors has developed. *See* Richard S. Beloris, *The Contingent Economy: The Growth of the Temporary, Part-time and Subcontracted Workforce* (1989); Bureau of Labor Statistics, U.S. Dep't of Labor, Report 900, *Contingent and Alternative Employment Arrangements* (Aug. 1995); Eileen Silverstein and Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 Stetson L. Rev. 1 (1996). Estimates are that between one-quarter and one-third of employed Americans belong to that contingent work force, which now includes lawyers, doctors, maintenance workers, data processors, and architects, among others. Silverstein & Goselin, *supra*, at 1 (citing Beloris, *The contingent Economy; The Growth of the Temporary Part-Time and Subcontract Workforce* (1989)). In large part, businesses have developed this workforce to reduce labor costs and to avoid existing legal and customary constraints. *See generally*, Comment, *On the Clock Versus on the Books: The Appropriate Method for Counting Employees Under Tile VII, the ADEA and other Labor Laws*, 44 Buffalo L. Rev. 963, 964 (1996).

This trend has reconfigured the American workplace and the number of contingent workers continues to grow. Contingent workers are often precluded from participation in employer sponsored benefits programs and are often unprotected by statutes intended to provide labor protection. Disturbingly, contingent workers are often the very racial, ethnic, or gender minorities in need of those protections. *See* Beloris, *supra*. As Silverstein and Goselin, *supra*, at 2, point out: "Involuntary part-time and temporary workers include disproportionate

numbers of white females and African-American workers, . . . contingent employment moves a considerable number of workers who were already experiencing significant differentials in wages, benefits and employment opportunities into relationships where the projects are even more bleak . . . ."

Workplace protection mandated by federal law is unfortunately still needed for racial minorities and women, and, increasingly, for persons with disabilities. The Fourth Circuit's shorthand approach to this fact-intensive question allows employers to circumvent these laws and could spur the development of a class of workers that function as "employees" but are called "independent contractors" and are therefore denied the protections of all of these laws. Permitting employers to make arrangements with workers, as happened in the instant case, whereby workers can inadvertently waive their rights to protection under federal remedial statutes is contrary to the law of this Court and contrary to the purposes for which Congress enacted this legislation. There is thus an urgent need for this Court's resolution of this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

96-1317

JAMES M. CILECEK, M.D.,

Plaintiff-Appellant,

v.

INOVA HEALTH SYSTEM SERVICES, *ET AL.*,

Defendants-Appellants.

DECIDED: June 2, 1997

Before MURNAGHAN, NIEMEYER, and MOTZ, *Circuit Judges*.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Motz joined. Judge Murnaghan wrote a dissenting opinion.

OPINION

NIEMEYER, *Circuit Judge*.

We must decide in this case whether Dr. James W. Cilecek, a physician under contract to provide

emergency medical services at two hospitals, was an employee covered by Title VII of the Civil Rights Act of 1964 or an independent contractor and therefore not so covered. Based on the undisputed facts about the incidents of the relationship, we conclude as a matter of law that Cilecek was an independent contractor, and therefore we affirm the summary judgment entered by the district court in favor of the defendants.

I

Inova Health System Services, a Virginia corporation, owns and operates several health care facilities in northern Virginia, including Fairfax Hospital and ACCESS of Reston. In March 1989, Inova entered into an exclusive contract with Emergency Physicians of Northern Virginia, Ltd. ("Emergency Physicians"), under which Emergency Physicians agreed to staff Fairfax Hospital and ACCESS of Reston with emergency physicians. At the time, Dr. James W. Cilecek had worked at those facilities as an emergency physician for about five years. After Emergency Physicians obtained the contract with Inova, Cilecek wrote Dr. Thom Mayer, Emergency Physicians' CEO and owner:

> As discussed, I will work as an independent contractor covering an average of 120 hours per month. . . . Compensation will be $80/hour and the group will provide liability insurance with tail coverage. In the event that we decide to change our agreement, I will notify you at least 60 days in advance and would ask that you provide similar notification.

In August 1991, Cilecek reduced his hours worked for Emergency Physicians and began working for Mary Washington Hospital in North Stafford, Virginia, a non-Inova facility. But in December 1992 he returned full time to Emergency Physicians, at which time Emergency Physicians and Cilecek restated a relationship that both believed was an independent contractor relationship. In summarizing the resumed relationship, Cilecek wrote Mayer:

> This letter is to confirm our discussion of October 15 in which we agreed that I would resume full-time status with the Fairfax Emergency Department commencing December 1, 1992.
>
> * * *
>
> Total hours will average 130-140 hours/month with no less than 100 hours and with increase to 180 hours during periods of need. Compensation will be, under Independent Contractor status, $90/hour with malpractice being paid by the group.

In July 1994, Cilecek wrote the clerk who scheduled Emergency Physicians' shifts, "I will be reducing my shifts temporarily this fall" to work on a "large" personal project and to work "a few shifts" at another medical facility. When Cilecek received the draft schedule for September and October 1994, he learned that he was being assigned even fewer shifts than he had wished, and he objected. He wrote a letter stating that despite his request for five to six shifts in

September and six to eight shifts in October on any of eighteen specified dates, the draft schedule showed him working only five shifts in September and two in October. Emergency Physicians refused to adjust the schedule. Instead, it wrote a letter terminating the relationship between the parties because "it is in the best interest of both parties." While Emergency Physicians terminated the relationship effective November 1, 1994, it offered to pay Cilecek through December on the basis of ten shifts. In response to Emergency Physicians' termination, Cilecek wrote:

> At this time, there has been no attempt on your behalf to restore my shifts in the September-October schedule. Further, I understand you wish for me to sign an agreement of termination effective November 1, 1994. Given my recent testimony in the legal action, Lowe vs. INOVA, I conclude that you are taking retaliatory action against me. Such retaliation is unlawful.
>
> I do not agree that it is in the best interest of both parties to terminate our working agreement.

Cilecek was referring in his letter to testimony that he had given in a deposition on August 23, 1994, in support of a former employee's claim against Inova for sexual harassment.

Dr. Cilecek filed this action against both Inova and Emergency Physicians under Title VII of the Civil Rights Act of 1964, alleging that he was terminated in retaliation for giving testimony in a former employee's

sexual harassment suit. On the defendants' motion for summary judgment, the district court concluded that Cilecek was not an employee of either Inova or Emergency Physicians, but rather an independent contractor, and that therefore he was not covered by Title VII. The court summarized the incidents of the relationship on which it relied to reach its conclusion as follows:

> There is more in this case than how the taxes are treated. This plaintiff asked to be an independent contractor, he contracted with his employer to be an independent contractor. He has testified under oath in another hearing that he was an independent contractor. He worked for others at times and had the opportunity and the latitude to work for others. He was not bound by any noncompetition agreement as other similarly situated employees at the Emergency Physicians. He didn't receive the same benefits. He didn't receive the same tax treatment. His duties and his scheduling were different than regular employees. He wasn't required to be on call. He designated his own shifts. And he was not supervised basically in the providing of care even though he did use their equipment.
>
> I believe simply with these differences in a regular employee, that simply the fact that he was paid by them and used the equipment that they provide in their facility does not make him an

> employee. And when you add all these up, I find that it is clear that he was an independent contractor and not covered by the federal Act.

The court dismissed pendent state law claims without prejudice to their prosecution in state court. This appeal followed.

II

Title VII of the Civil Rights Act prohibits employers from retaliating against their employees for testifying in support of an employment discrimination claim. *See* 42 U.S.C. § 2000e-3. The Act defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f). And "employer" is defined as a "person . . . who has fifteen or more employees" during a specified period of time. 42 U.S.C. § 2000e(b). In adopting this circular definition, Congress has left the term "employee" essentially undefined insofar as an employee is to be distinguished from an independent contractor. The parties to this case agree that Title VII does not cover an independent contractor.

It now appears to be settled that when Congress uses the term "employee" in a statute without defining it, the courts will presume that Congress intended to describe "the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989) (addressing rights under the Copyright Act of 1976 to a sculpture "prepared by an employee within the scope of his or

her employment")). Following *Reid*, the Court in *Nationwide* adopted the "common-law test for determining who qualifies as an 'employee' under ERISA." *Id.* at 323. And again recently, the Court agreed that "employee" under Title VII is defined by "traditional principles of agency law." *Walters v. Metropolitan Educ. Enter. Inc.*, 117 S. Ct. 660, 666 (1997). Because Congress had overruled the Supreme Court's earlier interpretations of "employee" under both the National Labor Relations Act and the Social Security Act, in each of which the Court had defined employee "in light of the mischief to be corrected and the end to be obtained," *see United States v. Silk*, 331 U.S. 704, 713 (1947), the Court in *Reid* and *Nationwide* abandoned that approach, adopting the presumption that "Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." *Nationwide*, 503 U.S. at 325.

In order to establish a uniform nationwide application of the terms "employer," "employee," and "scope of employment" for purpose of applying federal statutes, *Reid* instructs that we rely on "the *general* common law of agency" and not the law of a particular state. *Reid*, 490 U.S. at 740-741 (emphasis added). And to determine the general common law of agency, the Court notes that it has traditionally looked to sources such as the *Restatement of Agency*. *See id.* at 752 n.31. *Restatement (Second) of Agency* § 220(2) provides a nonexhaustive list of factors for consideration when distinguishing employees from independent contractors. Focusing on these factors and also on others taken from various cases, the Court in *Reid* identified the following factors as relevant to the determination of whether the author of a sculpture was an "employee" or an independent contractor:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751-752. The Court cautioned, however, that no one factor is determinative, and the consideration of factors must relate to the particular relationship under consideration. *See id.* at 752; *see also Mangram v. General Motors Corp.*, 108 F.3d 61 (4th Cir. 1997) (applying common law factors in determining whether claimant under ADEA is employee); *Robb v. United States*, 80 F.3d 884 (4th Cir. 1996) (applying common law principles to determine federal question of whether physician was independent contractor for purposes of FTCA); *cf. Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983) (applying similar 12-factor test to determine whether claimant under ADEA is an

employee); *Haavistola v. Community Fire Co. of Rising Sun*, 6 F.3d 211 (4th Cir. 1993) (applying *Garrett* factors in Title VII case).

At root, the distinction at common law between an employee and an independent contractor rests on the degree of control exercised by the hiring party. An employer controls the work and its instrumentalities and circumstances to a greater degree than does a hiring party in an independent contractor relationship. *See Restatement (Second) of Agency* §§ 2 & 220(2). But the degree of distinction between the two is related to the work itself and the industry in which it is performed. Thus, for example, the ultimate control of doctors performing work at hospitals results from a competition for control that is inherent in the duty of each to discharge properly its professional responsibility. A doctor must have direct control to make decisions for providing medical care, but the hospital must assert a degree of conflicting control over every doctor's work -- whether an employee, an independent contractor, or a doctor merely with privileges -- to discharge its own professional responsibility to patients. *See Robb*, 80 F.3d at 888-91 (discussing role of control involving medical judgments). Consequently, it is less productive to debate the control over the discharge of professional services in the medical context than it might be in other service relationships. *See Alexander v. Rush North Shore Medical Ctr.*, 101 F.3d 487 (7th Cir. 1996) (holding that an anesthesiologist who was required to be "on call" and whose patients were assigned to him by the hospital was nonetheless not an employee of the hospital for purposes of a Title VII action). More enlightening is the control involved in deciding when a doctor performs his services, the number of hours he

performs them, and the administrative details incident to his professional services.

With this background in mind, we think it relevant to consider the following factors in determining whether a doctor, performing emergency room medical services at a hospital, is an employee or an independent contractor: (1) the control of when the doctor works, how many hours he works, and the administrative details incident to his work; (2) the source of instrumentalities of the doctor's work; (3) the duration of the relationship between the parties; (4) whether the hiring party has the right to assign additional work to the doctor or to preclude the doctor from working at other facilities or for competitors; (5) the method of payment; (6) the doctor's role in hiring and paying assistants; (7) whether the work is part of the regular business of the hiring party and how it is customarily discharged; (8) the provision of pension benefits and other employee benefits; (9) the tax treatment of the doctor's income; and (10) whether the parties believe they have created an employment relationship or an independent contractor relationship. *See Reid*, 490 U.S. at 751-52; *Mangram*, 108 F.3d at 62-63; *Restatement (Second) Agency* § 220(2).

With these principles now in hand, we proceed to consider the relationship between Cilecek and Emergency Physicians.

III

The facts defining the incidents of the contractual relationship between Cilecek and Emergency Physicians are not materially in dispute. While their significance to whether an employment

relationship or an independent contractor relationship was created is vigorously debated, resolution of that debate is a question of law. *See, e.g., MacMullen v. South Carolina Elect. & Gas Co.*, 312 F.2d 662, 670 (4th Cir. 1963) (whether undisputed facts establish "statutory employee" status for purposes of workers compensation is question of law).

When we consider the factors most relevant to the relationship established between Cilecek and Emergency Physicians in this case, we conclude that the district court was correct in determining that Cilecek was an independent contractor. Most significantly: (1) The parties expressly set out from the beginning to create an independent contractor relationship, in distinction from the employment relationship that Emergency Physicians had with other doctors; (2) Cilecek proposed the number of hours he would work during any given month and the allocation of those hours to various shifts, and the hours that he worked were not uniform; (3) Cilecek had freedom to do other work, not only for himself but also for other health care facilities unrelated to Inova or Emergency Physicians; (4) Cilecek was paid only for work actually performed and not a uniform salary; (5) Except for professional liability insurance, Cilecek funded his own pension and other "employee benefits"; and (6) Both Cilecek and Emergency Physicians treated his taxes as if Cilecek were an independent contractor, in that Emergency Physicians did not withhold any taxes that were incident to an employment relationship. In summary, Cilecek exercised an independence from Emergency Physicians that enabled him to determine his hours, his income, and who he worked for. These are core incidents to a work relationship that are inconsistent with employee status.

While there are factors indicating otherwise, they are not as probative of the ultimate question of control. Cilecek focuses most heavily on (1) his obligation, when working for Emergency Physicians, to comply with detailed hospital regulations in carrying out his services at Inova hospitals; (2) his use of hospital-supplied instruments, and (3) the hospitals' ultimate control over the number of hours that he worked. Cilecek also argues that because Emergency Physicians paid him an "hourly wage" and unilaterally terminated their work relationship and because his relationship with Emergency Physicians had been an enduring one, he was Emergency Physicians' employee.

It is true that Cilecek was required to abide by hospital rules and regulations for the treatment of patients, which regulated his work at the hospitals in substantial detail. As Cilecek has summarized those regulations:

> The rules and regulations governed every aspect of patient care, including: taking medical histories; conducting physical exams, tests and other procedures; patient progress notes; the manner of issuing patient medical orders; prerequisites and post-requisites to surgical procedures; ordering and administration of medications and medical devices; obtaining consultations and referrals; and making entries in medical records.

All of these regulations, however, relate to the professional standard for providing health care to patients for which both Emergency Physicians and the

Inova hospitals had professional responsibility to their patients. While Cilecek certainly retained a professional independence in performing professional services, he also shared a professional responsibility to cooperate with the hospitals to maintain standards of patient care, to keep appropriate records, and to follow established procedures. This shared control exists both for employee doctors and for doctors merely enjoying practice privileges at a facility. If the hospitals did not insist on such details in the performance of professional services by doctors at their facilities, they would be exposing themselves to recognized professional liability. Because of the overarching demands of the medical profession, the tension in professional control between doctors and hospitals for medical services rendered at hospitals is not, we believe, a reliable indicator of whether the doctor is an employee or an independent contractor at the hospital.

Similarly, that Cilecek used instruments of the hospital emergency room that were supplied by the hospital is also inherent in the provision of emergency medical services and likewise is not a reliable indicator of employee status. Whether a doctor specializing in emergency medicine is an employee of the hospital or simply has privileges at the hospital, he must, in almost every case, use emergency room facilities provided by the hospital in order to render his services.

And finally, while Emergency Physicians did ultimately determine the number of hours that Cilecek would work, that determination was made only after Cilecek proposed the number of hours he was willing to work. Moreover, the number of hours announced by the hospital in each case represented a coordination with the needs of the hospital in staffing the emergency

room. We note that Cilecek did not, by choice, work the same number of hours each month and that he initiated his own adjustments to those hours. In at least two instances, he varied his hours in order to work at facilities not owned by Inova.

The additional factors argued by Cilecek do not advance his cause. Cilecek's pay was negotiated by the parties at an hourly rate to relate his pay to the time he worked. While employees are often paid "hourly wages," independent contractors are likewise often paid by the hour, e.g., plumbers. In this case, Cilecek's hourly rate enabled payment of fair compensation for fluctuating work and that fact is not indicative of whether Cilecek was an independent contractor or an employee. Also, that either party had a right to terminate the relationship is not indicative. The fact that Emergency Physicians, rather than Cilecek, in fact terminated the relationship does not indicate whether Cilecek was an employee or independent contractor. And finally, that the relationship was an enduring one might suggest the regularity inherent in an employment relationship. But, at various times in this relationship, Cilecek on his own initiative substantially curtailed his hours at Inova facilities in order to work at other hospitals, spending over a year in such an arrangement in the case of Mary Washington Hospital. His relationship with Emergency Physicians did not restrict his ability to make these adjustments nor did it prohibit him from working at unrelated facilities.

It is important to our conclusion in this case that the parties carefully designed their relationship to give Cilecek greater freedom than might otherwise be enjoyed by salaried employees of a hospital, and to that end they mutually agreed that they wanted to establish

an independent contractor relationship. *See Restatement (Second) Agency* § 220(2)(i) ("In determining whether one acting for another is a servant or an independent contractor," the fact of "whether or not the parties believe they are creating the relation of master and servant" is considered); *Robb*, 80 F.3d at 893 ("we can not ignore the clear expression of intent . . . to establish an independent contractor relationship"). Moreover, the mutual intent to create an independent contractor relationship was confirmed uniformly by the parties in the way they treated benefits and taxes and in the way they represented their relationship to third parties.

Considering all the relevant factors, we conclude that Cilecek was an independent contractor and that, therefore, he is not entitled to sue either Emergency Physicians or Inova under Title VII of the Civil Rights Act of 1964 based on their termination of the relationship.

AFFIRMED

United States Court of Appeals for the Fourth Circuit

96-1317

JAMES W. CILECEK, M.D.,

Plaintiff-Appellant,

v.

INOVA HEALTH SYSTEM SERVICES, INC., *ET AL.*,

Defendants-Appellees.

MURNAGHAN, *Circuit Judge*, dissenting.

It is a difficult line to draw between (1) facts which are disputed and (2) a set of facts outlining what is crystal clear. Here, in granting summary judgment in the hospital's favor and thereby foreclosing any resolution by the factfinder of the issue: employee or independent contractor, the majority has crossed that difficult line and gathered up for itself resolution of a disputed fact question. The majority relies on the evidence, which is no doubt strong, in the hospital's favor but gives no weight to facts favoring Cilecek which are of sufficient substance to make the issue a disputed one.

I.

During his association with the Inova facilities, Dr. Cilecek considered himself a house physician on staff, not merely a doctor with privileges at the two

facilities. The Fairfax Hospital Medical Staff Bylaws and Rules and Regulations require that "[t]he acts performed by the House Physician shall be at the direction and under the supervision of the chairman of the clinical department to which the individual has been assigned." Dr. Cilecek's department chairman was Dr. Thom Mayer. Defendant Joan Miles served as administrator of ACCESS. Both Mayer and Miles had the power to enforce Dr. Cilecek's compliance by initiating corrective action against him, including additional supervision, suspension, and termination. After the entry of Emergency Physicians of Northern Virginia (EPNV), Dr. Cilecek continued to work at the Inova hospitals under the same terms and conditions, except that his paycheck and insurance were provided by EPNV, instead of Inova.

In August 1991, Dr. Cilecek went to work for another medical group located in North Stafford, Virginia. In the fall of 1992, however, EPNV offered Dr. Cilecek more money to work full-time at the Fairfax Hospital and ACCESS. Dr. Cilecek accepted Dr. Mayer's offer in a letter agreement in which Dr. Cilecek requested that he be deemed an independent contractor, and Dr. Mayer agreed. Such an agreement of the parties cannot overcome the actual facts. Under that agreement, Dr. Cilecek actually worked an average of 130-140 hours per month. EPNV paid Dr. Cilecek $90.00/hour and also supplied his medical malpractice insurance.

II.

The common law standard focuses on the degree of the employer's control over the individual. *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6

F.3d 211, 219-220 (4th Cir. 1993). The "economic realities" test examines the extent to which the individuals "who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

The Fourth Circuit follows the hybrid approach, which combines elements of both the common law and "economic realities" tests. *See Haavistola*, 6 F.3d at 220; *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 981 (4th Cir. 1983). Under the hybrid approach, the court's inquiry must focus on the following factors:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Haavistola, 6 F.3d at 222 n.4 (citing *Garrett*, 721 F.2d at 982).

A majority of those factors points to Dr. Cilecek as an employee. Dr. Cilecek argues that his supervision, setting of his schedule, and how his duties differed from other doctors were all in genuine dispute. Dr. Cilecek, and the amicus (the Equal Employment Opportunities Commission) point out that Dr. Cilecek presented evidence that he was considered a "house physician" under Inova's Bylaws. Those Bylaws stated that house physicians work under the "direction and supervision" of either (1) the director of their clinical department; or (2) staff physicians for whom work is done. Under either prong, Dr. Cilecek states that person was Dr. Mayer, who was both the Director of the Department of Emergency Medicine for Fairfax Hospital and the staff physician for whom Dr. Cilecek worked.

Moreover, Dr. Cilecek presented evidence that he was required to work under the supervision of Dr. Mayer, and that Dr. Mayer's supervision of him was pervasive. In his affidavit attached to his opposition to Inova's summary judgment motion, Dr. Cilecek contends that Inova controlled the way Dr. Cilecek performed his work, including how he took medical histories, conducted physical exams, tests and other procedures, made patient progress notes, issued patient medical orders, handled surgical procedures, ordered and administered medications and medical devices, obtained consultations and referrals, and made entries in medical records. Dr. Cilecek also states that Miles, Inova's administrator, controlled how he performed his work, such as when to conduct patient physical examinations, and how to handle prescription pads.

In addition, Dr. Cilecek argues that he presented evidence that Inova and EPNV set and unilaterally changed his hours, as well as evidence showing that his duties were the same as the other doctors at the hospital. Dr. Cilecek states that he was required to submit a requested schedule, and his schedule would either be approved as submitted or altered, thus he was not free to set his own hours. Furthermore, Dr. Cilecek stated in his affidavit that if he wanted to work fewer hours in a month he obtained the approval of his superior, Dr. Mayer.

With respect to the same duties issue, Dr. Cilecek contends that the record shows that Dr. Cilecek was required to submit his requested schedule for work, the same as other emergency physicians, Inova's Bylaws required every "house physician" to perform the same duties, observe the same rules and procedures, operate under the same supervision, meet the same performance standards, and answer to the same disciplinary procedure. Finally, Inova and EPNV provided the workplace and equipment.

Here, disputes abound over the issues of Dr. Cilecek's supervision by Mayer and the manner in which Dr. Cilecek's work schedule was set, for example, whether Dr. Cilecek could himself provide his own schedule, or whether Mayer could alter the schedule. The choice of the term "independent contractor" by Cilecek to describe himself, while the factfinder might pay it attention, was by no means controlling. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

In the instant case, the district court granted summary judgment in favor of EPNV and Inova pre-

discovery, that is before these disputed issues could even be explored. The majority opinion usurps the role of the factfinder and resolves disputed factual issues in EPNV and Inova's favor. It appears to me that relevant facts were in dispute, making summary judgment inappropriate and ill-advised. Consequently, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

96-1317

JAMES W. CILECEK, M.D.,

Plaintiff-Appellant,

v.

INOVA HEALTH SYSTEM SERVICES, *ET AL.*,

Defendants-Appellees.

JUDGMENT

Appeal from decision of the United States District Court for the Eastern District of Virginia in CA-95-1434-A entered January 4, 1996, Judge Claude M. Hilton.

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

DATED: JUNE 02, 1997

/s/Patricia S. Connor
Patricia S. Connor, Clerk

ISSUED AS A MANDATE: August 13, 1997

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

96-1317

JAMES W. CILECEK, M.D.,

Plaintiff-Appellant,

v.

INOVA HEALTH SYSTEM SERVICES, *et al.*,

Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Amicus Curiae.

ORDER

Appellant has filed a petition for rehearing with a suggestion for rehearing in banc.

Judge Murnaghan voted to grant panel rehearing. Judges Niemeyer and Motz voted to deny.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judge Murnaghan voted to rehear the case in banc, Chief Judge Wilkinson, and Judges Russell, Widener, Hall, Ervin, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Michael, and Motz voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

Dated: August 5, 1997

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JAMES W. CILECEK, M.D.	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 95-1434-A
	)	
INOVA HEALTH SYSTEM SERVICES, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before this Court on the plaintiffs' Motion to Reconsider and Vacate Order. The Court believes that its decision was correct for the reasons previously stated from the bench. It is hereby ORDERED

that plaintiff's Motion to Reconsider and Vacate Order is DENIED.

Alexandria, Virginia
February 23, 1996

/s/ Claude M. Hilton
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JAMES W. CILECEK, M.D.	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 95-1434-A
	)	
INOVA HEALTH SYSTEM SERVICES, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER

This matter came before the Court on the defendants' motion for summary judgment and motion to dismiss which the Court construes as a motion for summary judgment. For reasons stated from the bench, it is hereby

ORDERED that the defendants' motion for summary judgment as to Count I is GRANTED, and Count I is DISMISSED, and it is further

ORDERED that all remaining state claims are DISMISSED without prejudice.

Alexandria, Virginia
January 4, 1996

/s/ Claude M. Hilton
United States District Judge

(2)

Supreme Court, U.S.
FILED
DEC 3 1997
CLERK

No. 97-759

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JAMES W. CILECEK, M.D.,
Petitioner,

v.

INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS OF NORTHERN VIRGINIA, LTD. and THOM A. MAYER, M.D.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ACADEMY OF EMERGENCY MEDICINE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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December 3, 1997

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25 pp

QUESTION PRESENTED

Did the Fourth Circuit err in usurping the province of the jury by holding that an emergency room doctor was an "independent contractor" not protected by Title VII (1) in the face of evidence that the hospital exercised control over his activities identical to the control exercised over physicians that were called "employees" and (2) contrary to the law established by this Court and other Circuits?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-759

JAMES W. CILECEK, M.D.,

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v.

INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS OF NORTHERN VIRGINIA, LTD. and THOM A. MAYER, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE OF THE AMERICAN ACADEMY OF EMERGENCY MEDICINE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, American Academy of Emergency Medicine ("AAEM"), is a non-profit organization representing

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[1] Petitioner and respondents have consented to the filing of this amicus brief. Their letters of consent are being lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, Amicus Curiae hereby submits that its counsel authored the present brief and that no party other than Amicus Curiae made any monetary contribution to the preparation or submission of this brief.

emergency room physicians. The organization is committed to the unencumbered access to quality emergency care; the specialized practice of emergency medicine; the growth of residency programs and medical education to ensure high quality patient care, the personal and professional welfare of individual specialists in emergency care medicine; and fair and equitable practice environments necessary to allow emergency medical specialists to deliver the highest quality patient care. AAEM submits this brief to supplement the arguments made by petitioner, Dr. Cilecek, who is one of the Academy's members, on the issue presented that is of particular concern to AAEM and its members: Whether emergency room doctors should be deprived of Title VII protection in the Fourth Circuit solely because they are "independent contractors" for tax purposes, notwithstanding the workplace realities, and the fact that many such independent contractors perform the same functions, are subject to the same controls, and have the same duties and obligations as doctors labeled "employees". This case is important to AAEM because the Court of Appeals decision threatens the vital Title VII rights of its membership in the Fourth Circuit.

STATEMENT OF THE CASE

1. Dr. Cilecek is a Board-certified emergency medicine physician with almost fifteen years experience practicing medicine. Dr. Cilecek was hired in 1984 by the Emergency Department of Commonwealth Hospital, which was one of many hospitals in the northern Virginia region owned by respondent Inova (under its former name, Fairfax Hospital System). At that time, Commonwealth Hospital and Inova had a contract with a medical group called Commonwealth Medical Services to provide physician staffing for the emergency department. Dr. Cilecek was employed by

Commonwealth Medical Services, but had no written employment contract.

2. In or around 1985, Inova built a new hospital, Fair Oaks Hospital, and Dr. Cilecek began working at the Fair Oaks Emergency Department with Commonwealth Medical Services. In the fall of 1987, Dr. Cilecek transitioned to the emergency departments of two other Inova facilities, Fairfax Hospital, and its affiliate Access of Reston, a free-standing emergency facility. In June 1988, Fair Oaks Hospital ended its relationship with Commonwealth Medical Services, but Dr. Cilecek was asked to continue working at Fairfax Hospital and Access of Reston. In the spring of 1989, Inova signed an exclusive contract with Emergency Physicians of Northern Virginia, Ltd. ("EPNV") for EPNV to provide all emergency department physicians for Fairfax Hospital and Access of Reston, while nurses, other personnel, and day-to-day administration and business for the hospital would be provided by Inova. At that time, Dr. Thom Mayer, the president of EPNV and new head of the Emergency Department at Fairfax Hospital and Access of Reston, asked Dr. Cilecek to work for EPNV at those facilities. Dr. Cilecek agreed, and was not required by EPNV or Inova to sign a contract as a condition of his employment. While Dr. Cilecek was told by EPNV during his employment with them that his status was that of an "independent contractor," as explained below, for Title VII purposes Dr. Cilecek was an employee of EPNV. Although neither Dr. Cilecek nor any other emergency physicians were provided with the terms of EPNV's agreement with Inova, Dr. Cilecek was told that he was required to report to Dr. Mayer and to an Inova hospital administrator. Approximately one year later, in April 1990, Dr. Mayer asked Dr. Cilecek to sign an independent contractor agreement, but he did not require that Dr. Cilecek

do so, nor did he terminate or otherwise take action against Dr. Cilecek when he did not sign the agreement.

3. In August 1991, Dr. Cilecek approached Dr. Mayer regarding the possibility of Dr. Cilecek accepting a part-time position at a new free-standing emergency facility in North Stafford, Virginia which was part of Mary Washington Hospital ("MWH"). Dr. Mayer approved of this proposal because he thought that the new MWH facility might provide additional patients to Inova AirCare, a helicopter transport program which was headed by Dr. Mayer and was an integral part of the Inova system. In late August 1991, Dr. Cilecek began working part-time at MWH while he continued to work part-time for EPNV and Inova at Fairfax Hospital. However, fourteen months later in October 1992, Dr. Mayer offered Dr. Cilecek more money to return full-time to EPNV, and Dr. Cilecek accepted. Dr. Cilecek returned to a full-time position at Fairfax Hospital Emergency Department and Access of Reston, both Inova facilities, in January 1993, working in excess of 100 hours per month at those facilities until his termination in October 1994. Aside from his part-time work at MWH, Dr. Cilecek never had a medical practice apart from his practice at Inova facilities while he was employed by EPNV. While some doctors simply have "staff privileges" at Inova hospital facilities, which allow them to admit patients who come to them at their individual medical practices, Dr. Cilecek had no such separate practice, and depended entirely on his work at the Inova facility for his income and medical practice.

4. In late 1993, Dr. Cilecek approached Dr. Mayer several times regarding Dr. Cilecek's concerns about unsafe Emergency Department practices at Access of Reston, where he was then working full-time. For instance, Dr. Cilecek told Dr. Mayer that he believed that some of the nurses and

medical technicians hired by Access and/or Inova were not adequately trained for emergency care and were a hazard to the well-being of patients. Dr. Cilecek also told Dr. Mayer that he believed there was a dangerous lack of maintenance of the oxygen systems and the Inova helicopter facilities at Access of Reston. In addition to Dr. Mayer, Dr. Cilecek discussed his concerns with Joan Miles, the Inova Administrator of Access of Reston; Steve Brown, the Inova Administrator of Fair Oaks Hospital, who was Joan Miles' superior; and other Inova and EPNV personnel. In response to these discussions, Dr. Mayer called Dr. Cilecek to his office in December 1993, reprimanded him and threatened him with termination. Dr. Cilecek was prohibited by Dr. Mayer from discussing any of his concerns or criticisms about the Inova/EPNV facilities with anyone except Dr. Mayer or Dr. Cates (Vice-Chairman of the Emergency Department of Fairfax Hospital), under penalty of termination.

5. In or around January 1994, Dr. Cilecek requested a written contract of employment, and Dr. Mayer agreed to execute a contract as long as certain provisions were included to prohibit Dr. Cilecek from speaking to others about conditions in the Emergency Department. In April 1994, Dr. Mayer presented to Dr. Cilecek a contract which prohibited Dr. Cilecek from criticizing Access of Reston or EPNV either overtly or covertly, and from discussing "criticisms of the leadership or management, whether physician or non-physician in nature,...with either the staff, patients, medical staff, or senior management of Inova." *Only Dr. Cilecek* was asked to sign such an agreement; no other

physician or medical staff at Access of Reston or Fairfax Hospital were requested to do so.[2]

Dr. Cilecek believed that the contract Dr. Mayer presented him was illegal because it infringed on his First Amendment rights. He told Dr. Mayer that he still wanted to sign a contract but was not comfortable with the portions of the contract restricting his free speech rights. Dr. Cilecek asked if the portions of the contract dealing with speech could be excised, but Dr. Mayer did not respond and did not raise the issue of the contract again.

6. In July 1994, Dr. Cilecek was asked by an attorney for Virginia Lowe, a former employee of Inova at the Access of Reston facility who was suing Inova for sexual harassment, to sign an affidavit in support of Ms. Lowe's case regarding sexual harassment at the Access facility against Inova nurses and employees. Dr. Cilecek signed such an affidavit on July 7, 1994.

7. On July 13, 1994, Steve Brown, the Inova Administrator of Fair Oaks Hospital, sent a memorandum to management at Fair Oaks Hospital, which was distributed at Access of Reston as well, ordering that no employees of either Fair Oaks or Access could discuss with former employees any personnel policies or other information that might support the former employees' lawsuits or administrative actions against Inova. The memo also directed employees to contact Inova's Human Resources Office if any former employees contact them or their staff.

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[2] For instance, Dr. Robert Cates, Dr. Kathleen Kelly and other emergency physicians at Fairfax Hospital and Access of Reston were not required to sign contracts prohibiting or restricting their free speech rights.

8. In late July 1994, Dr. Cilecek received a subpoena requiring him, under penalty of arrest, to give a deposition in Ms. Lowe's sexual harassment lawsuit against Inova. Around this time, Dr. Cilecek was called by Joan Miles, Inova's Administrator of Access of Reston, who strongly implied to Dr. Cilecek that if he gave testimony favorable to Virginia Lowe or unfavorable to Inova (such as the testimony in his affidavit), another witness in the case might say disparaging things about him that could lead to trouble for him. This veiled threat, intended to intimidate Dr. Cilecek, turned out to be untrue and unfounded.

Before appearing for his deposition on August 23, Dr. Cilecek submitted his schedule request for September and October to Kaye Wear (an EPNV employee at Fairfax Hospital), as he did each month. Because he was planning a vacation, Dr. Cilecek requested that instead of his regular 100+ hours per month (approximately 10-12 shifts), he be scheduled for 5-6 shifts (50-60 hours) in September and 6-8 shifts (60-80 hours) in October. However, on August 22, 1994, *the day before his scheduled deposition in the sexual harassment lawsuit against Inova and only a few weeks after Ms. Miles' veiled threats*, Dr. Cilecek was given a draft schedule for September and October which gave Dr. Cilecek 5 shifts in September, as he requested, but only 2 shifts in October (as opposed to the 6-8 he had requested). It appeared to Dr. Cilecek that he was being warned by EPNV and Inova that his employment was in danger if his deposition testimony the next day was in any way detrimental to Inova or EPNV.

9. The next day, August 23, Dr. Cilecek appeared under subpoena for his deposition in the sexual harassment case against Inova. Dr. Cilecek testified truthfully that the plaintiff, Virginia Lowe, on numerous occasions had complained to him, as a senior physician at Access of Reston,

about the sexually explicit behavior of a certain Inova employee toward her, and that Ms. Lowe's complaints to Inova administrators about this behavior had gone unheeded. Dr. Cilecek also testified that nurses employed by Inova at the Access of Reston facility had also complained to him about sexually inappropriate behavior of other Inova physicians and employees against them. When asked under oath about his opinion of Inova's administration of the Fairfax Hospital and Access of Reston, Dr. Cilecek replied truthfully that he thought that the Inova administrator at Access of Reston, Joan Miles, was not a competent manager and that he believed that Access had patient care and safety problems. Under further questioning at his deposition, Dr. Cilecek stated truthfully that he had complained to EPNV and Inova about his concerns over Access' problems.

10. Dr. Mayer received a copy of Dr. Cilecek's deposition transcript soon after August 23.[3] Almost immediately, Inova and EPNV retaliated against Dr. Cilecek for his testimony in the sexual harassment case, which Inova ultimately settled with Ms. Lowe. When Dr. Cilecek wrote Dr. Mayer on August 29, protesting the drastic cut in his scheduled hours for September and October and asking that it be corrected, Dr. Mayer ignored Dr. Cilecek altogether and took no action to correct the schedule. On September 27, 1994, Dr. Cilecek wrote Dr. Mayer again, asking that he review the schedule and noting that Dr. Cilecek had submitted his schedule request for full-time (10-12) shifts for November and December 1994.

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[3] Dr. Cilecek had been told by an Inova employee, Judy Gobi, that Joan Miles showed a copy of Dr. Cilecek's deposition to Dr. Mayer and told him that she wanted to get rid of Dr. Cilecek because of his "devastating" testimony against Inova.

11. Dr. Mayer responded on October 5, 1994 *on Inova letterhead*, stating that "it is in the best interest of both parties that your working relationship with EPNV terminate" effective November 1, 1994. Dr. Cilecek had received no warning of this termination and Dr. Mayer gave no reason for terminating Dr. Cilecek, instead simply noting that Dr. Cilecek had never signed a contract with EPNV. Dr. Mayer asked that Dr. Cilecek accept the terms set forth in this letter as "full settlement and satisfaction of any [and] all claims and rights against EPNV, its officers, agents, and employees, and otherwise, arising in any way from your relationship with EPNV and your waiver and release of same...." and signify such acceptance with his signature on the letter. It is important to note that prior to this time, Dr. Cilecek had never been reprimanded, suspended or otherwise disciplined by Dr. Mayer, EPNV or Inova, except for the single incident in 1993 regarding his voicing concerns over patient care. His record of performance as an emergency physician was otherwise spotless.

Dr. Cilecek responded to Dr. Mayer's termination letter on October 24, 1994, stating that the termination constituted unlawful retaliation for his deposition testimony in the *Lowe v. Inova* sexual harassment case and that he wished to remain employed by EPNV. Dr. Cilecek also noted that "it is common knowledge that a number of physicians in our group do not have contracts [n]or has there been any requirement for physicians to sign a contract," and that the contract Dr. Mayer had presented to Dr. Cilecek in April 1994 had infringed on his free speech rights. Dr. Cilecek refused to sign the termination letter as Dr. Mayer requested. On October 31, 1994, Dr. Mayer wrote Dr. Cilecek, stating that his continued work with EPNV was "not an option at this time."

12. Dr. Cilecek filed suit against the hospital and EPNV in the United States District Court for the Eastern District of Virginia on October 12, 1995, alleging wrongful retaliatory discharge and violation of Title VII. The Defendants moved for summary judgment which was granted without permitting Dr. Cilecek any discovery, the Court ruling that Dr. Cilecek was an "independent contractor" and therefore not protected by Title VII. The District Court relied primarily on the fact that the parties referred to Dr. Cilecek as an "independent contractor," and that he was treated as such for tax purposes.

13. The divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the District Court's holding. In its opinion, the Court focused primarily on EPNV's agreement that Dr. Cilecek would be an "independent contractor." The Fourth Circuit virtually ignored the overwhelming other factors pointing to a determination that Dr. Cilecek was an "employee" for Title VII purposes. In doing so, the Fourth Circuit failed to follow the well-established principle that a determination of whether an individual is an "independent contractor" or an "employee" for such purposes turns primarily on the degree of control exercised by the hiring party, a factor strongly in favor of finding that Dr. Cilecek was entitled to Title VII protection in this case.

Judge Murnaghan dissented, protesting that the governing legal standard dictates that the agreement of the parties "cannot overcome the actual facts" which were that Dr. Cilecek worked essentially full time, at a set hourly rate, and that EPNV would pay him and supply his malpractice insurance. In reviewing the factors identified by this Court and other courts as determinative of the employment

relationship, Judge Murnaghan concluded that "[a] majority of those factors points to Dr. Cilecek as an employee."

14. Dr. Cilecek petitioned for a rehearing en banc on June 14, 1997. On August 5, 1997, the Fourth Circuit denied the petition. The United States and the Equal Employment Opportunity Commission as amicus curiae supported Dr. Cilecek's position both on appeal and on rehearing, arguing that the panel's creation of a new Title VII exclusion in the medical context would improperly narrow the reach of Title VII, and "frustrate (Congress') remedial purpose in enacting Title VII to protect workers from discrimination."

INTRODUCTION AND SUMMARY OF ARGUMENT

In its erroneous holding, the Fourth Circuit relied primarily on the agreement between the parties that Dr. Cilecek would be called an "independent contractor" for tax purposes. The Fourth Circuit ignored this Court's rulings in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) and *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), articulating the test for construing whether or not a person in an employment context is entitled to protection for federal and remedial statute purposes. In those cases, this Court required that consideration must be given to the hiring party's right to control the manner and means of the work, and made it clear that the mere use of an "independent contractor" label does not deprive the worker of protection under Title VII.

In its fact intensive decision upholding the District Court's grant of summary judgment without submitting the evidence to a jury, the Fourth Circuit likewise created a direct conflict with recent decisions of the Ninth and Eleventh Circuits which held that a contractual arrangement structured to avoid creating an employment relationship does not

overcome the realities of the workplace. The result of this holding is that certain doctors (and possibly other professionals) are deprived of Title VII protection in the Fourth Circuit merely because they are "independent contractors" for tax purposes, regardless of the fact that they perform the same functions, are subject to the same controls, and have the same duties and obligations as doctors who are "employees" for tax purposes. This is a fundamentally unfair result that runs contrary to the holdings of this Court and other Circuits and undermines the intent of Title VII.

I. THE FOURTH CIRCUIT DECISION IS DIRECTLY CONTRARY TO THIS COURT'S RULE REJECTING MERE LABELS AS DETERMINATIVE OF EMPLOYMENT STATUS, AND GIVES RISE TO DISPARITY AMONG THE CIRCUITS ON THIS ISSUE

A. The Fourth Circuit's Failure to Follow the Well-Settled Standard for Construing the Term "Employee" Under Federal Statutes

Under Title VII, and a variety of other federal statutes, who is an "employee" is not determined by the labeling of that person, but rather by what work is done and how it is controlled. It is not possible to circumvent the obligations an employer has to an employee by the mere labeling of that individual as an "independent contractor." *Rutherford Food Corp. v. McComb*, 331 U.S. at 729 (In interpreting the term "employee" under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*, this Court stated that "[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."). This Court most recently again construed the meaning of the term "employee" under ERISA. In *Darden*, this Court held that

where a federal statute does not define the term "employee," as in the circular definition provided in Title VII, the Court should presume the term to incorporate traditional common law principals of agency, under which control is the key factor. *Id.* at 323 ("'In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.'" (*quoting Community for Creative Non-violence v. Reid*, 490 U.S. 730, 751 (1989))). This well-settled principal has been followed by the Ninth and Eleventh Circuits in *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) and *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256 (11th Cir. 1997). The *Garcia* case construed the term "employee" under the Age Discrimination and Employment Act, and explicitly provided that the doctor was to perform his duties "as *an independent contractor and not as an employee*" and that nothing in the contract should "be construed to create" any "relationship between the parties *other than an independent contractor relationship.*" *Garcia*, 104 F.3d at 1258 (emphasis in original). Under the contract, the corporate provider was to exercise no control over the means or manner in which the doctor performed his duties. *Id.* Notwithstanding this very explicit agreement between the parties, the Eleventh Circuit found that the contract did not deprive the "independent contractor" of federal statutory protection. *Id.*

Likewise, in *Vizcaino*, *supra*, the Ninth Circuit construed the term "employee" under the Employment Retirement Security Act of 1974. In *Vizcaino*, the Ninth Circuit found Microsoft workers to be covered by the Act, notwithstanding contracts designating them as "independent contractors" with an explicit intention not to create an employment relationship, and the fact that the Microsoft

workers were responsible for their own taxes and benefits. *Id.* at 1008-12. In making this determination, the Ninth Circuit considered how the workers were actually treated, finding them to be treated in reality like employees having been "fully integrated" into the employment work force. *Id.* at 1008.

That a determination of whether or not a worker is a "employee" or an "independent contractor" should turn on the work place realities, and not mere labeling, is widely recognized by this Court and the Courts of Appeals. *See Rutherford Food Corp. v. McComb*, 331 U.S. at 729 ("[W]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act."); *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 232 (2d Cir. 1995) ("The employment status of an individual for the purposes of ERISA is not determined solely by the label used in the contract between the parties."); *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) (status of "employee" under FLSA depends on totality of circumstances "rather than on any technical label"), *cert. denied*, 507 U.S. 928 (1993); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81 (8th Cir. 1996) ("The actual duties and role of the individual govern [whether an individual is an "employee" under Title VII]. An employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship."), *cert. denied*, 117 S. Ct. 1694 (1997); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) ("The employment status of an individual for the purposes of ERISA is not determined by the label used in the contract between the parties"); *see also Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("An employer's self-serving label of workers as independent

contractors is not controlling . . ."); *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982) ("A determination of whether an individual is an employee and therefore covered by the protections in ADEA should not center on the label which the organization has chosen to give to the position"), *cert. denied*, 464 U.S. 819 (1983); *see also Eastern Inv. Corp. v. United States*, 49 F.3d 651, 655 (10th Cir. 1995) ("[T]he law is clear that Lowen's classification of a salesperson as employee or independent contractor is of no consequence....").

Further, this Court has held that a party cannot even waive the protection of a federal remedial statute by his or her agreement to be called an "independent contractor." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (an employee's rights under Title VII may not be waived prospectively); *Vizcaino*, *supra*; *see also Mukhtar v. Castleton Service Corp.* 920 F. Supp. 934, 938 (S.D. Ind. 1996) ("parties cannot agree to waive otherwise applicable protection provided by acts of Congress....[E]ven though the parties may have labelled their relationship in one way, their labels do not control if enough of the indicia of an employment relationship are present.") (citation omitted).

Thus, the Fourth Circuit's ruling is directly contrary to the authority of this Court and is in conflict with the authority in other Circuits. The Fourth Circuit improperly emphasized EPNV's labeling of Dr. Cilecek as an independent contractor, effectively ignoring the other factors that this Court has established are relevant to the employment relationship question. The Fourth Circuit's decision is also in conflict with the *Vizcaino* and *Garcia* cases in which the Ninth and Eleventh Circuits held that the labeling of a worker is not determinative, but rather the actual workplace realities must be considered. This Court should grant the petition for a *writ*

of certiorari to resolve this conflict among the Circuits created by the Fourth Circuit's erroneous decision.

B. The Fourth Circuit's Failure to Weigh All Relevant Factors and Impingement Upon the Role of the Jury

In *Darden*, *supra*, this Court set forth the following factors in determining who qualifies as a "employee" entitled to federal statutory protection: (1) the hiring party's right to control the manner and means of the worker's performance (the most important factor); (2) the skill required in the particular occupations; (3) the source of instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to a hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. *Id.* at 323-24. But for the tax treatment of Dr. Cilecek, all of these factors favor a finding that Dr. Cilecek was entitled to protection under Title VII. All emergency room doctors have the same skills and do the same work; all work is done in the hospital, during the hospital's regular business, with the hospital's tools, equipment, personnel and patients; there was a relationship between the parties of ten years duration; Dr. Cilecek was paid by the hour, not by the job; and he received malpractice insurance from EPNV. Dr. Cilecek could not work when and as he pleased, but rather had to work at least 100, and up to 180 hours per month, depending on the hospital's needs. There is

no justification for the Fourth Circuit's failure to consider all of these factors.

Additionally, in its determination, the Fourth Circuit resolved disputed factual issues against Dr. Cilecek, ignoring the well-established principal that all permissible inferences must be weighed in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Fourth Circuit made this fact intensive determination, rather than allowing this factual analysis to be made by a jury. It did this despite the fact that federal courts generally recognize the weighing of these many factual considerations make such a determination inappropriate for summary judgment. *See Garcia v. Copenhaver, Bell & Assoc.*, *supra*. (reversing the district court's decision to dismiss plaintiff's complaint for lack of subject matter jurisdiction where the facts concerning whether or not defendant was an "employer" was an element of plaintiff's ADEA claim and there were disputed facts about whether plaintiff was an "employee" of defendant). Indeed, in his dissent, Judge Murnaghan observed that the majority "resolve[d] disputed factual issues" against Dr. Cilecek, making summary judgment "inappropriate and ill advised." *See also Mallare v. Saint Luke's Hosp.*, 699 F. Supp. 1127 (E.D. Pa. 1988) (whether doctor in medical residency program was an employee of the hospital was not a matter for summary judgment where there were facts that both supported and weighed against finding an employment relationship); *Sharkey v. Ultramar Energy*, *supra* (court reversed district court's decision to grant defendant's motions of summary judgment where employment status of individual for purposes of ERISA is fact intensive inquiry, not determined solely by label used in contract and could not be properly determined on summary judgment); *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 899 (5th Cir. 1997) (in denying plaintiff's motion for summary judgment on issue of whether plaintiff

was "employee" within the meaning of Title VII, district court explained that the determination "'requires a factual analysis of often conflicting allegations'" and therefore the "issue is not amenable to summary judgment at this time'"(citation omitted)); *Folkerson v. Circus Circus Enters.*, No. 93-1758, 1995 U.S. App. LEXIS 30137 (9th Cir. Oct. 16, 1995) (district court improperly granted summary judgment for defendant on plaintiff's Title VII claim on grounds plaintiff was independent contractor where evidence indicated defendant exercised control over plaintiff's work); *Daughtrey v. Honeywell, Inc.*, 3 F.3d at 1493 (reversed district court decision to grant summary judgment for defendants on plaintiff's ERISA claim where facts were disputed on pivotal issue of degree of control exercised by Honeywelll over plaintiff).

II. THE FOURTH CIRCUIT DECISION CREATES A DISPARITY IN TITLE VII PROTECTION IN THE VARIOUS CIRCUITS, SINCE THE FOURTH CIRCUIT'S DECISION DEPRIVES CERTAIN EMERGENCY ROOM DOCTORS, AND POSSIBLY OTHER PROFESSIONALS, OF TITLE VII PROTECTION

As a result of its decision, the Fourth Circuit has articulated a new rule for determining whether Title VII provides protection in the case of doctors, and perhaps other professionals. The Fourth Circuit has now held that, in that Circuit, the label attached to a worker for tax purposes, either contractually or otherwise, is the most relevant factor, not the workplace realities. This decision has created a circumstance under which hospitals and other health care facilities in the Fourth Circuit can circumvent Title VII requirements and other statutes by labeling its workers "independent contractors" for tax and other business purposes. The result

of this holding is that emergency room doctors (and possibly other professionals) are deprived of Title VII protection in the Fourth Circuit by the mere labeling of them as "independent contractors" for tax purposes notwithstanding that they perform the same functions, are subject to the same controls, and have the same duties and obligations as other emergency room doctors. This is a fundamentally unfair result that runs contrary to the holdings of this Court and other Circuits, and undermines the remedial purpose and intent of Title VII. There is no legal authority offered by the Fourth Circuit, or other compelling policy reason, for this radical departure from the previous decisions of this Court and other Circuits. The Court of Appeals' decision creates a wide disparity between the Title VII protection afforded emergency room doctors in the Fourth Circuit, and the protection afforded other emergency room doctors in other Circuits. Indeed, emergency room doctors working side by side, performing the same work in the same hospitals within the Fourth Circuit, are to be treated differently under Title VII under the Court of Appeals' decision. It is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to address the clear deprivation of Title VII protection afforded emergency room doctors in the Fourth Circuit.

CONCLUSION

Based on the foregoing, Amicus Curiae, American Academy of Emergency Medicine, hereby respectfully submits that this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JAMES W. CILECEK, M.D.,
Petitioner,
v.
INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS OF NORTHERN VIRGINIA, LTD. and THOM A. MAYER, M.D.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE WOMEN'S LEGAL DEFENSE FUND, THE NATIONAL EMPLOYMENT LAW PROJECT, THE NATIONAL WOMEN'S LAW CENTER, AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-759

JAMES W. CILECEK, M.D.,
Petitioner,

v.

INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS OF NORTHERN VIRGINIA, LTD. and THOM A. MAYER, M.D.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICI CURIAE* OF THE WOMEN'S LEGAL DEFENSE FUND, THE NATIONAL EMPLOYMENT LAW PROJECT, THE NATIONAL WOMEN'S LAW CENTER, AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae are women's rights, employment rights, and labor organizations that work to eliminate all forms of discrimination from the workplace.[1] The question presented

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* made a monetary contribution to the preparation or submission of this brief.

[Continued]

by this case is of great interest to *amici* because the outcome will determine whether federal civil rights protections will extend to large numbers of workers who are mislabeled as "independent contractors" while actually functioning as employees. Unless courts carefully examine the underlying facts of how a worker's job is performed and controlled—rather than deferring to an employer's characterization of the worker as an independent contractor—the reach of federal anti-discrimination laws will be significantly and inappropriately constricted.

SUMMARY OF ARGUMENT

Millions of American workers are characterized by their employers as "independent contractors." However, many of these workers actually perform the same work under the same conditions as "employees"—and, indeed, employers have substantial economic incentives to misclassify "employees" as "contractors." Unless courts explore the underlying factual circumstances to determine whether employers have actually retained supervision and control of the terms and conditions of their workers' jobs, employers can and will avoid their responsibilities under federal civil rights laws by misclassifying workers as "independent contractors." Determining the appropriate level of deference due an employer's characterization of a worker as an "independent contractor" will help determine the availability of Title VII and related protections to a substantial number of American workers.

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[1] [Continued]

Petitioner and Respondents have consented to the filing of this brief, and the parties' letters of consent have been filed with the Clerk of this Court.

Individual statements of interests of the *amici* are attached as the Appendix to this brief.

REASONS FOR GRANTING THE PETITION

THE OUTCOME OF THIS CASE WILL HELP DETERMINE THE AVAILABILITY OF TITLE VII AND RELATED EMPLOYMENT PROTECTIONS TO THE LARGE NUMBERS OF WORKERS WHO ARE CLASSIFIED AS "INDEPENDENT CONTRACTORS" EVEN THOUGH THEY ACTUALLY FUNCTION AS "EMPLOYEES."

More than 8,300,000 American workers are characterized as independent contractors. Bureau of Labor Statistics, U.S. Dep't of Labor, Rep. 900, *Current Population Survey, Contingent Work Supplement* (1995); Anne E. Polivka, *Contingent and Alternative Work Arrangements, Defined*, 119 Monthly Lab. Rev. 3, 8 tbl.1 (Oct. 1996).

Often, these "contractors" do the same work under the same conditions as "employees," but without the protections of Title VII and other employment laws.[2] For example, in a recent decision, the Ninth Circuit refused to conclude that workers were "independent contractors" merely because they had signed "contracts" characterizing them as such, and instead examined whether they were performing the work of regular employees. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1008, 1011-12 (9th Cir. 1997) (en banc). The court ruled that Microsoft had misclassified a large pool of workers as "independent contractors." *Id.* Similarly, the Second Circuit has noted that it is common practice in the garment industry to "contract out" work that had previously been done in-house, in large part to escape coverage of employment laws.

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[2] As the United States and the Equal Employment Opportunity Commission ("EEOC") noted in their *amici* brief below, "[i]ncreasingly, employers rely on persons who are labeled 'contractors' to accomplish tasks previously performed by full-time employees," and "[s]ome commentators have observed that misclassification of employees as 'independent contractors' is a widespread occurrence.'" Brief *Amici Curiae* on Appeal at 17 n.10 (citations omitted).

Jou-Jou Designs v. Int'l Ladies Garment Workers Union, 643 F.2d 905, 906 (2d Cir. 1981).

In fact, many of these "contractors" continue to perform the same work they previously performed as "employees" for the same employer. For example, 19.2 percent of female workers and 25.1 percent of male workers who identified themselves as independent contractors paid on a wage or salary basis reported that they had been switched from another status with their current employer to that of contractor. Anne E. Polivka & Jay Stewart, *Into Contingent and Alternative Employment: By Choice?*, 119 Monthly Lab. Rev. 55 (Oct. 1996). Similarly, the New York Times recently reported that up to one-fifth of independent contractors were formerly employees of the companies for which they now work as contractors. Louis Uehitelle, *More Downsized Workers Are Returning as Rentals*, N.Y. Times, Dec. 8, 1996, at A1.

Indeed, employers have a wide range of financial incentives to misclassify employees as "independent contractors." As the bipartisan Commission on the Future of Worker-Management Relations recently observed:

> [A]n employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding, and will be relieved of responsibility to the worker under labor and employment laws. The worker will lose the protections of those laws and benefits and the employer's contribution to Social Security, but may accept the arrangement nonetheless because it gives him or her an opportunity for immediate and even illegitimate financial gains through underpayment of taxes. Many low-wage workers have no practical choice in the matter.

Commission on the Future of Worker-Management Relations, *Report and Recommendations* 35-36 (1994); *see also* General Accounting Office, Pub. No. GAO/HRD-91-56, *Workers At Risk: Increased Numbers in Contingent Employment Lack Insurance, Other Benefits* 21 (1991) (by characterizing workers as "contractors," employers often hope to avoid paying taxes and fringe benefits and to avoid defending against employment law claims); Ellen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 Stetson L. Rev. 1, n.25 (1996) (noting that "significantly lower labor costs are an attractive reason for designating employed persons as independent contractors and not employees").

Given the financial advantages of misclassification, it is not surprising that the Internal Revenue Service estimated that as many as 3.4 million workers are misclassified as independent contractors. H.R. Rep. No. 101-979, at 4 (1990) (citing *Tax Revenue Losses and Tax Administration Problems Involving Independent Contractors: Hearing Before the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations*, 101st Cong. 76 (1989)). Indeed, a General Accounting Office sample study found that 38 percent of employers intentionally or unintentionally misclassified employees as independent contractors. *Id.* (citing General Accounting Office, Pub. No. GAO/GGD 89-107, *Tax Administration Information: Returns Can Be Used to Identify Employers Who Misclassify Employees* 5 (1989)). The IRS further estimated that misclassification cost the federal government a staggering $1.5 billion in income, Social Security, and unemployment tax revenue each year. *Id.*

While classifying workers as independent contractors confers certain economic advantages upon employers, too often it carries grave consequences for the workers themselves. As this case and others demonstrate, misclassification may strip workers of important civil rights and other

employment protections under Title VII, the Age Discrimination in Employment Act, ERISA, the National Labor Relations Act, the Family and Medical Leave Act, and unemployment compensation laws.

Absent legal protections, workers have less bargaining power when negotiating for pay and benefits. For example, women classified as independent contractors have median weekly earnings of only $361—compared to $410 for women and $543 for men characterized as "employees." Steven Hipple & Jay Stewart, *Earnings and Benefits of Workers in Alternative Work Arrangements*, 119 Monthly Lab. Rev. 47 (Oct. 1996). Women managers and professionals who are in independent contractor arrangements earn ten percent less than women managers and professionals in "regular" arrangements; women in blue-collar occupations earn 23 percent less. Economic Policy Institute & Women's Research & Education Institute, *Managing Work and Family* 39 (1997). Women of color classified as independent contractors make even less. Economic Policy Institute & Women's Research & Education Institute, *Nonstandard Work, Substandard Jobs* 29 tbl.17 (1997). Only two percent of women classified as independent contractors have health insurance through their jobs, compared to 55 percent of women "employees." Hipple & Stewart, *supra*, at 52 tbl.5. And only two percent have pension plans through their jobs, compared to 54 percent of women in "traditional" arrangements. *Id.* at 53 tbl.6. Given all the adverse economic consequences, it is not surprising that as many as 800,000 workers classified as "contractors" would prefer a traditional employment relationship. Bureau of Labor Statistics, *supra*, at tbl.11 (9.8 percent of the over eight million independent contractors would prefer a traditional relationship).

In sum, unless courts carefully examine these relationships—rather than relying on employers' often self-serving characterization of their workers as independent contractors—large numbers of workers will be denied improperly

the protection of Title VII and other key civil rights laws. Because this case presents the question of the level of deference due an employer's classification of a worker as an independent contractor, its resolution will help determine whether thousands, and perhaps millions, of workers are entitled to key anti-discrimination and employment protections.

CONCLUSION

For the reasons presented above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 3, 1997

APPENDIX

APPENDIX

Founded in 1971, the *Women's Legal Defense Fund* (WLDF) is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. WLDF has placed special emphasis on equal employment opportunity by challenging sex-based discrimination in the courts, and by leading efforts to promote and enact employment policies such as the 1993 Family and Medical Leave Act, the Civil Rights Act of 1991, and the 1978 Pregnancy Discrimination Act.

The *National Employment Law Project* (NELP) is a nonprofit organization dedicated to advocating for the employment rights of the working poor and the unemployed. For over 25 years, NELP has engaged in direct advocacy through litigation and policy work on a broad range of issues, including job training, employment discrimination, unemployment compensation reform, the employment rights of workforce participants, and most other basic employment laws, including the Family and Medical Leave Act. NELP and its constituents have a direct and sustained interest in the issue raised by this case.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII and other civil rights laws. NWLC has a deep and abiding interest in assuring the eradication of discrimination against women in the workplace.

The *Service Employees International Union, AFL-CIO, CLC (SEIU)* is the largest union of health care employees in the country. It represents employees in many differ-

ent health care professions, including increasingly physicians. SEIU recently affiliated one of the largest physician labor associations, the Committee of Interns and Residents, also establishing ties to the United Salaried Physicians and Dentists. Its health care members—physician and non-physician—have a vital interest in ensuring the protections of Title VII are afforded to all health care professionals.

(4)

No. 97-759

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

JAMES W. CILECEK, M.D.,

Petitioner,

vs.

INOVA HEALTH SYSTEMS SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS of NORTHERN VIRGINIA, Ltd. and THOM A. MAYER, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit, based on the particular facts presented herein, properly affirmed the summary judgment of the District Court finding Dr. Cilecek to be an independent contractor and dismissing his claims under Title VII, 42 U.S.C. § 2000(e)?

STATEMENT REQUIRED BY RULE 29.6

The parent company for Respondent Inova Health System Services is Inova Health System Foundation. Inova Health System Services has one nonwholly owned subsidiary, Home Health Clinical Services, L.L.C.

Respondent Emergency Physicians of Northern Virginia, Ltd. has no parent corporation, nor does it have any nonwholly owned subsidiaries.

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United States Supreme Court Rule 10 6

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Inova Health System Services ("Inova"), Joan Miles, R.N., Emergency Physicians of Northern Virginia, Ltd. ("EPNV") and Thom A. Mayer, M.D. request that this Court deny the Petition for a Writ of Certiorari, which seeks review of the opinion of the United States Court of Appeals for the Fourth Circuit in this matter. This case involves nothing more than the application of this Court's settled test for determining whether a worker is an independent contractor or an employee to a unique set of facts. The Court of Appeals and the District Court both reached the determination, based on undisputed facts, that the Petitioner was an independent contractor for the purposes of his Title VII claim. The case has been reviewed exhaustively by the lower courts, Petitioner having sought reconsideration from the District Court and reconsideration and in banc review from the Court of Appeals. This case does not break any new ground; nor does the decision of the Fourth Circuit conflict with decisions of the Ninth and Eleventh Circuits, as Petitioner contends. Rather, the differences in these decisions merely reflect the different factual records on which they are based. The Fourth Circuit's decision is clearly correct; and the issues raised by the Petition are not worthy of this Court's plenary consideration. This Petition should be denied.

COUNTER STATEMENT OF THE CASE

1. This case was initiated by Dr. Cilecek against Inova, Joan Miles, R.N. (an Inova employee), EPNV, and EPNV's President Thom A. Mayer, M.D. In his lawsuit, Dr. Cilecek contends that he was wrongfully discharged in violation of Title VII of the Civil Rights Act of 1964, in retaliation for testimony rendered in an employment discrimination action against Inova brought by one of its nurses. In addition, Dr. Cilecek asserted several state law claims.

2. Inova and Nurse Miles responded to the Complaint with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and EPNV and Dr. Mayer filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Upon consideration of the undisputed facts presented in support of these motions, including the sworn deposition testimony of Dr. Cilecek in which he admitted that he operated as an independent contractor, the District Court granted summary judgment in favor of all defendants on the Title VII claim and dismissed the state law claims without prejudice. (*See* Order of Dismissal, attached to the Petition at A27-28).

3. Dr. Cilecek moved the District Court to reconsider and vacate the dismissal. Upon review of the motion, and the defendants' oppositions thereto, the District Court denied the motion. (*See* Order attached to the Petition at A26).

4. Dr. Cilecek appealed the dismissal to the United States Court of Appeals for the Fourth Circuit. The matter was fully briefed and argued. The Fourth Circuit, agreeing with the District Court, found that the undisputed facts established, as a matter of law, that Dr. Cilecek was an independent contractor and not an employee of either EPNV or Inova.[1]

5. Dr. Cilecek then moved for reconsideration or rehearing in banc by the Fourth Circuit. The Department of Justice filed an *Amicus Curiae* brief in support of Dr. Cilecek's motion. Upon consideration of the arguments presented, which are largely the arguments presented here, the Fourth Circuit denied the motion for reconsideration or rehearing in banc by a 12-1 vote.

6. This Petition is based primarily on the alleged

1. Two of the named defendants, Dr. Mayer and Nurse Miles, were not alleged to be Dr. Cilecek's employer and there is no claim that the dismissal of the Title VII claim should be reversed as to them.

misapplication of the law to Dr. Cilecek's version of the facts, which either ignores or mischaracterizes the factual record in significant respect. When all of the undisputed factual evidence is considered, as it was by both courts below, it becomes apparent that this case has been correctly decided and does not raise significant issues deserving of review by this Court.

7. Inova is a Virginia corporation that owns and operates several health care facilities in northern Virginia, including Fairfax Hospital and ACCESS of Reston. (Petition at A2).

8. In March, 1989, Inova contracted with EPNV to provide physicians to staff the emergency medicine facilities at Fairfax Hospital and ACCESS of Reston. (Petition at A2).

9. Dr. Cilecek, who had been working as an independent contractor for another entity at Fairfax Hospital, wrote a letter to EPNV offering to work for EPNV "as an independent contractor." (Petition at A2, J.A. at 176).[2] There was no evidence presented that Dr. Cilecek was ever employed by, or had a direct contractual relationship with, Inova.

10. In August, 1991, Dr. Cilecek unilaterally reduced his hours with EPNV to work for Mary Washington Hospital in Stafford, Virginia. Mary Washington Hospital has no relationship to Inova or EPNV. Dr. Cilecek returned to EPNV in December 1992, again requesting independent contractor status. (Petition at A3). There is no mention of any employment status with Inova.

11. In July 1994, Dr. Cilecek again unilaterally reduced the number of shifts he was willing to work for EPNV, to allow time for a large personal project and to work at another emergency medical facility. (Petition at A3).

---

2. References to J.A. are references to the Joint Appendix in the Fourth Circuit.

12. In the deposition he gave in an employment discrimination suit involving an Inova nurse, Dr. Cilecek, while represented by counsel, testified several times that he was an independent contractor engaged by EPNV. Nowhere did he claim an employment relationship with EPNV or any contractual relationship whatsoever directly with Inova. (J.A. at 174, 175-76, 197).

13. While the facts establishing Dr. Cilecek's intention to be an independent contractor are compelling, these were not, as Dr. Cilecek argues, the only facts considered. In addition to the above, and following a *de novo* review of the entire record, the Fourth Circuit made the following factual findings:

> When we consider the factors most relevant to the relationship established between Cilecek and Emergency Physicians in this case, we conclude that the district court was correct in determining that Cilecek was an independent contractor. Most significantly: (1) The parties expressly set out from the beginning to create an independent contractor relationship, in distinction from the employment relationship that Emergency Physicians had with other doctors; (2) Cilecek proposed the number of hours he would work during any given month and the allocation of those hours to various shifts, and the hours that he worked were not uniform; (3) Cilecek had freedom to do other work, not only for himself but also for other health care facilities unrelated to Inova or Emergency Physicians; (4) Cilecek was paid only for work actually performed and not a uniform salary; (5) Except for professional liability insurance, Cilecek funded his own pension and other "employee benefits"; and (6) Both Cilecek and Emergency Physicians treated his taxes as if Cilecek were an independent contractor, in

> that Emergency Physicians did not withhold any taxes that were incident to an employment relationship. In summary, Cilecek exercised an independence from Emergency Physicians that enabled him to determine his hours, his income, and who he worked for. These are core incidents to a work relationship that are inconsistent with employee status.

(Petition at A11).

14. The trial court likewise considered more than just the "label" in reaching its determination that Dr. Cilecek was an independent contractor.

> There is more in this case than how the taxes are treated. This plaintiff asked to be an independent contractor, he contracted with his employer to be an independent contractor. He has testified under oath in another hearing that he was an independent contractor. He worked for others at times and had the opportunity and the latitude to work for others. He was not bound by any noncompetition agreement as other similarly situated employees at the Emergency Physicians. He didn't receive the same benefits. He didn't receive the same tax treatment. His duties and his scheduling were different than regular employees. He wasn't required to be on call. He designated his own shifts. And he was not supervised basically in the providing of care even though he did use their equipment.
>
> I believe simply with these differences in a regular employee, that simply the fact that he was paid by them and used the equipment that they provide in their facility does not make him an employee. And when you add all these up, I find that it is clear that he was

> an independent contractor and not covered by the federal Act.

(Petition at A5-A6, the Fourth Circuit quoting the District Court's statements from the bench).

15. As evidenced by these holdings, both courts gave full consideration to the relevant factors regarding Dr. Cilecek's status as an independent contractor and the unique facts of this case.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT PROPERLY APPLIED THE LAW TO THE UNDISPUTED FACTS.

A. The Fourth Circuit Applied The Law The Petition Cites As Controlling.

The Rules of this Court state that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the United States Supreme Court. Nonetheless, the primary complaint advanced in this Petition is that the Fourth Circuit did not properly consider the facts which Cilecek believes demonstrate his "employee" status, and that the rule of law applied to those facts, while the correct law, was misapplied. (Petition at 11). This same argument was rejected by both the District Court and the Fourth Circuit. In fact, it was the main focus of Petitioner's unsuccessful request to the Fourth Circuit for reconsideration or in banc review. This Petition adds nothing new.

Not only is the argument advanced by Dr. Cilecek insufficient to merit granting this Petition under the Rules of the United States Supreme Court, it is plainly wrong. The Fourth Circuit did not misapply the law. In reaching its conclusion that Dr. Cilecek was an independent contractor, the Fourth Circuit applied the common law agency considerations set out by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). (Petition at A6-A10).[3] In his Petition, Dr. Cilecek cites both of these cases for the controlling rule of law. (Petition at pp. 9-10). *Reid* and *Darden* do not require that *every* factor point toward either an "independent contractor" or "employee" relationship. Rather, the court must consider the "working relationship as a whole." *Wilde v. County of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994). *See also Oestman v. National Farmers Union Ins. Co.*, 958 F.2d 303, 305-306 (10th Cir. 1992) (the relationship should be characterized only after considering all of the facts). This is precisely the analysis undertaken by the Fourth Circuit and the District Court.

B. The Fourth Circuit Properly Considered The Factors Relating To Employee Or Independent Contractor Status In The Context Of Dr. Cilecek's Profession.

The Fourth Circuit recognized that "no one factor is determinative and the consideration of factors must relate to the particular relationship under consideration." (Petition at A8, citing *Reid*, 490 U.S. at 752). In reaching its decision, the Fourth Circuit did no more than conclude — and properly so — that the traditional factors pertinent to Dr. Cilecek's status as an

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3. These cases set forth substantially the same test as adopted by the Fourth Circuit in *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983) and *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211 (4th Cir. 1993), which are also cited in the Fourth Circuit opinion. (Petition at A8-9).

employee or an independent contractor must be considered within the context of hospital-based, emergency room medical care. (Petition at A9). In so doing, the Fourth Circuit acted in accordance with this Court's precedent in *Darden* and *Reid*.

Here, the record is replete with the Fourth Circuit's references to and consideration of all of the factors applicable to Dr. Cilecek's independent contractor status. In reaching its decision, the Fourth Circuit did not give a "shorthand" approach to Dr. Cilecek's claim. (Petition at 25). Nor did it rely solely upon Dr. Cilecek's admissions under oath that his status was that of an independent contractor. Rather, the Fourth Circuit gave full consideration to all of the circumstances surrounding the work Dr. Cilecek performed, including the following:

- Dr. Cilecek was free to do — and did do — other work, not only for himself but also for other health care facilities unrelated to Inova or EPNV;

- Dr. Cilecek proposed the number of hours he would work during any given month and the allocation of those hours to various shifts;

- Dr. Cilecek was paid only for work actually performed and not a uniform salary as was the practice with EPNV employees;

- Except for professional liability insurance Dr. Cilecek received no benefits. He funded his own pension and all other "employee benefits";

- Both Dr. Cilecek and EPNV treated his

taxes as if Dr. Cilecek were an independent contractor, in that EPNV did not withhold any taxes that were incident to an employment relationship; and

- Dr. Cilecek worked primarily alone at night without supervision.

(Petition at A11 and J.A. at 346). Dr. Cilecek fails to address these facts in his Petition.

With respect to the parties' intent, the undisputed facts establish that Dr. Cilecek aggressively sought independent contractor status, and that the parties intended for Dr. Cilecek to function as an independent contractor:

- In May of 1990, Dr. Cilecek sent a letter to EPNV requesting independent contractor status (J.A. at 118);

- In October of 1992, after Dr. Cilecek had reduced his hours to work at another facility, he sent another letter to EPNV, confirming that he wished to resume his relationship with EPNV as an independent contractor (J.A. at 148);

- Dr. Cilecek testified repeatedly under oath, in the presence of his counsel, that he was an independent contractor (J.A. at 174-75, Dep. at 7-8, 10-11);

- Dr. Cilecek testified that he was engaged as an independent contractor working at Fairfax Hospital by another physician

group prior to his engagement with EPNV (J.A. at 176, Dep. p. 15);

- Dr. Cilecek testified that some physicians with EPNV were employees while others, such as himself, were independent contractors. (J.A. at 177, Dep. p. 18).

Dr. Cilecek's numerous admissions plainly reflect the parties' desire to create a relationship that subjected Dr. Cilecek to a lessor degree of control than EPNV's employees. None of these facts is disputed, nor could they be; and Dr. Cilecek's assertion that the Fourth Circuit rested its decision exclusively on the "label" that the parties used to describe their relationship is baseless.

In addition to overlooking these undisputed facts, Dr. Cilecek substantially overstates the importance of the rules and regulations with which he had to comply. These requirements, which he claims subjected him to hospital control, were administrative details necessary for uniform hospital administration, pertaining to such matters as to how to fill out patient histories and progress reports, how to order medications, order consultations, or handle prescription pads. This is not the type of control that connotes employee status.

> [T]he real test [concerning whether one is an employee or independent contractor] is control over the primary activity contracted for and not the peripheral, administrative acts relating to such activity.

Wood v. Standard Products Co., Inc., 671 F.2d 825, 832 (4th Cir. 1982). In the context of physicians, the "primary activity contracted for" is the medical care to be provided. Neither Inova nor EPNV exercised any significant control over Dr. Cilecek's

decisions regarding the medical care to be provided. Dr. Cilecek presented no evidence that anyone other than he made medical decisions for the patients that he was examining. Rather, the undisputed evidence is that Dr. Cilecek worked primarily at night, without any supervision regarding the medical care administered. (J.A. at 346). *See Garrett*, 721 F.2d at 982 (whether the individual is a specialist who works without supervision is a factor to be considered in determining employer/independent contractor status).

Moreover, the rules and regulations to which Dr. Cilecek refers apply to any physician who has privileges at the Hospital. If these administrative rules and regulations established an employer/employee relationship, then all physicians who treat patients at the hospital would be hospital employees. This is clearly not the case. Hospital privileges do not make a physician an employee of a hospital. *See Alexander v. Rush North Shore Medical Ctr.*, 101 F.3d 487 (7th Cir. 1996), *cert. denied*, __ U.S. __, 118 S. Ct. 54 (1997). Dr. Cilecek's compliance with these administrative rules and regulations is therefore not probative of "employee" status and the courts below properly so found. (Petition at A9-A11). In this connection, the Fourth Circuit did not "introduce a new rule for medical workers," as the Petition asserts. (Petition at 19). Rather, the Fourth Circuit gave full consideration to all of the circumstances surrounding Dr. Cilecek's work status. Upon such consideration, the Fourth Circuit properly determined, as a matter of law, based on the undisputed facts, that Dr. Cilecek was an independent contractor. (Petition at A11). *See MacMullen v. South Carolina Elec. & Gas Co.*, 312 F.2d 662, 670 (4th Cir.), *cert. denied*, 373 U.S. 912 (1963) ("whether the District Court applied the proper standards to essentially undisputed facts" was a question of law).[4]

4. Summary judgment is properly affirmed where, as here, the material (Cont'd)

C. Dr. Cilecek Has Failed To Preserve Any Claim That He Was Denied Discovery.

Dr. Cilecek's argument that summary judgment should not have been granted pending discovery also is without merit. (Petition at 16). The record before the Court contains abundant undisputed evidence directly pertinent to the independent contractor/employee analysis. Dr. Cilecek himself was in a position to dispute most of the evidence presented were it incorrect, but he did not present any conflicting evidence. Furthermore, Dr. Cilecek failed to file an affidavit pursuant to Fed. R. Civ. P. 56(f), stating with specificity the need for additional discovery, as he was required to do under well-established precedent. "[T]he failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) *quoting Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994).

> [A] party may not simply assert in its brief that discovery was necessary . . . when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit.

Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 961 (4th Cir. 1996) *quoting Nguyen*, 44 F.3d at 242. Dr. Cilecek never sought leave of Court to seek additional discovery.[5] At

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(Cont'd)

facts establish that an independent contractor relationship existed as a matter of law. *Alexander v. Rush North Shore Medical Ctr.*, 101 F.3d 487 (7th Cir. 1996), *cert. denied*, __ U.S. __, 118 S. Ct. 54 (1997); *Lambertsen v. Utah Dep't of Corrections*, 79 F.3d 1024 (10th Cir. 1996); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32 (3d Cir. 1983); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982).

5. Dr. Cilecek had ample opportunity to seek leave to take discovery, since the Defendants' reply briefs were served approximately thirteen days before oral argument on the summary judgment motion.

the hearing, he did not argue that he somehow was prejudiced by going forward. Instead, Cilecek's counsel — accompanied by Dr. Cilecek himself — chose to proceed with the summary judgment hearing without complaint. (J.A. at 354-361).

II.

THE FOURTH CIRCUIT'S OPINION DOES NOT CONTRADICT EITHER *GARCIA v. COPENHAVER, BELL & ASSOC., M.D.'S* OR *VIZCAINO v. MICROSOFT CORP.*

The Petition contends that the Fourth Circuit's decision conflicts with the decisions of the Eleventh Circuit in *Garcia v. Copenhaver, Bell & Assoc., M.D.'s*, 104 F.3d 1256 (11th Cir. 1997), and the Ninth Circuit in *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997). In fact, there is no conflict, much less one that would justify granting a writ. It is commonplace for different facts and circumstances to produce different results under the same legal standard; there is nothing more in these cases than one appellate court finding dismissal appropriate on one set of facts and other appellate courts finding summary disposition inappropriate on different facts in different procedural postures.

Garcia involved a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). In *Garcia*, the defendant contended that it was not an employer under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994). The trial court agreed and dismissed the claim. The Eleventh Circuit reversed. In so doing, the court engaged in a detailed analysis of Rule 12(b)(1) motions practice clearly not pertinent to this case. Moreover, the court in *Garcia* did not find that the emergency doctor was an employee. Rather, it held that the evidence presented to the trial court was insufficient to establish, as a matter law, that Dr. Garcia was an

independent contractor. *Garcia*, 104 F.3d at 1266-67. In this regard, unlike Dr. Cilecek, Dr. Garcia did not specifically bargain for independent contractor status, did not admit under oath that he intended to be and was an independent contractor and did not work for other emergency medical facilities while working for the alleged "employer." Likewise, there is no evidence mentioned in *Garcia* as to the payment of taxes or the provision of benefits, issues which clearly support independent contractor status. In addition, the Eleventh Circuit also specifically found that there were "disputed facts concerning the amount of control Copenhaver, Bell exerted over Garcia." *Garcia*, 104 F.3d at 1266-67. The facts relating to the control exercised over Dr. Cilecek, as identified in his Petition, were presented and considered by the courts below. Both the District Court and the Fourth Circuit found that those facts, to which there was no material dispute, were insufficient to constitute an employee relationship.

Nor is the Ninth Circuit's decision in *Vizcaino* inconsistent with the decision of the Fourth Circuit in this case. In *Vizcaino*, the Internal Revenue Service determined that numerous individuals who worked at Microsoft were employees for taxation purposes, even though their contracts identified them as independent contractors. Microsoft agreed with the IRS and converted some of these individuals to full time Microsoft employees. Several workers who were not retained as full time employees sought inclusion in Microsoft's employee benefit plans for their prior work. The plans challenged the employee status of these workers. In finding that the workers could be included in the benefit plans, the Ninth Circuit relied heavily on Microsoft's admission as to their employee status. These facts are not analogous to Dr. Cilecek's claims. There is nothing in the *Vizcaino* decision that conflicts with this case.

III.

THE DECISION OF THE FOURTH CIRCUIT DOES NOT AFFECT WORKERS PROTECTED UNDER TITLE VII.

Contrary to Dr. Cilecek's argument, the decision in this case does not eliminate the protections of Title VII or any other statute for any individual who is presently covered under Title VII. From its inception, Title VII has excluded independent contractors from its coverage and the decision in this case does not alter their status. Here, the Fourth Circuit made a determination that a single emergency room physician was an independent contractor, based on the law previously established by this Court and the peculiar facts of this case — including Dr. Cilecek's sworn admission that he was an independent contractor. The decision does not deprive any employees of their rights.

Dr. Cilecek's policy arguments, such as whether the exclusion of independent contractors facilitates the purposes of Title VII or whether changing conditions in the workplace have somehow altered the efficacy of Title VII, are for the Congress to decide. This Court should not accept Dr. Cilecek's invitation to contort the definition of an independent contractor to satisfy Dr. Cilecek's assessment of the proper reach of Title VII.

Finally, the argument that this decision has a negative impact on the Internal Revenue Service is without merit. (Petition at 22-24). The tax cases cited by Dr. Cilecek, relating to the employee/independent contractor distinction are based on precisely the fact-specific inquiry that the Fourth Circuit adopted in this case. For example, in both *Idaho Ambucare Ctr., Inc. v. United States*, 57 F.3d 752 (9th Cir. 1995) and *Dutch Square Medical Ctr. Ltd. Ptnrship v. United States*, 1994-2 Tax Cas.

(CCH) ¶ 50,490 (D.S.C. Sep. 6, 1994), a physician practicing through his own personal professional association served as the administrator of an urgent care facility. In both cases, the owner of the facility treated the administrator as an independent contractor. In *Idaho Ambucare*, the Ninth Circuit held that the physician-administrator had an arms-length contract with the urgent care group, under which control over the physician was reserved to the physician's professional association and that he was therefore an independent contractor to the urgent care facility, even though he had significant administrative responsibilities. Conversely, in *Dutch Square*, the court found that the physician-administrator of an urgent care group was an employee of the urgent care group because there was no arms-length contract reserving such control to the physician's professional association. These decisions simply illustrate that different factual circumstances, in seemingly similar situations, can produce opposite results. Here, the agreement between EPNV and Dr. Cilecek was clearly arms-length. Moreover, Dr. Cilecek retained full control over his medical decisions, as well as other important aspects of his practice; and the decision of the Fourth Circuit below is consistent with these tax decisions.

It is obvious that Dr. Cilecek is dissatisfied with the decision of his case. However, the Fourth Circuit applied the appropriate law, which Dr. Cilecek embraces, to facts that he does not dispute. Dr. Cilecek's dissatisfaction with this case's outcome does not merit further consideration by the Supreme Court of the United States.

CONCLUSION

Wherefore, Respondents Inova Health System Services, Joan Miles, R.N., Emergency Physicians of Northern Virginia, Ltd., and Thom A. Mayer, M.D., respectfully request that the Petition for a Writ of Certiorari filed by Dr. James Cilecek be denied.

Respectfully submitted,

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No. 97-759

In the Supreme Court of the United States

OCTOBER TERM, 1997

JAMES W. CILECEK, M.D.,
Petitioner,

v.

INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS of NORTHERN VIRGINIA, Ltd. and THOM A. MAYER, M.D.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

REASONS FOR GRANTING THE PETITION

Respondents' main theme is that the Fourth Circuit merely applied settled law in holding that Dr. Cilecek was an independent contractor, and not an employee. However, the United States and the Equal Employment Opportunity Commission have taken the opposite position in this case. They argued, in support of rehearing below, that the majority's decision "failed to properly apply" the rule set forth in this Court's decision in *Darden v. Nationwide Mutual Insurance Co.*, 510 U.S. 318 (1992): that the "primary factor" in determining employee status is the hiring party's right

to control the manner and means by which the hired individual performs the work. (Amicus Brief on Rehearing at 2.) They also argued that "this case is exceptionally important," and that it "will have significant negative implications for the increasing number of professionals who like Dr. Cilecek might be labeled 'independent contractors,' but are, as a matter of workplace reality, 'employees.'" (*Id.* at 6.) Likewise, *amici curiae*, The Women's Legal Defense Fund, The National Employment Law Project, The National Women's Law Center, and The Service Employees International Union, AFL-CIO, argue in this Court that the outcome of this case "will determine whether federal civil rights protections will extend to large numbers of workers who are mislabeled as 'independent contractors' while actually functioning as employees." (Amici Brief at 2.)

Respondents' brief in opposition has no answer for petitioner's contentions that the decision below (1) erroneously eliminates the important factor of "the hiring party's right to control the manner and means by which the [work] is accomplished"[1] and contravenes settled law that the label given to the worker is not controlling; (2) conflicts with the recent decisions of the Ninth and Eleventh Circuits; and (3) will have far-reaching implications beyond the range of Title VII and emergency physicians. Indeed, respondents merely repeat the stated basis for the Fourth Circuit's decision, with all of its flaws and inaccuracies. In these circumstances, the case clearly presents an issue that fully warrants this Court's review. Respondents' brief

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1 *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323 (1992).

in opposition raises only a few points that merit brief response.

1. Respondents make much of the fact that the Fourth Circuit purported to consider the "traditional factors" pertinent to employment status. (Opposition at 7-9.) However, although the Fourth Circuit claimed to apply the *Darden* test, it virtually eliminated the most significant factor under that test: whether the hiring party exercises control over the work of the hired party. Respondents argue that the "traditional factors" must be considered "within the context of hospital-based, emergency room medical care." (Opposition at 7-8.) The admittedly pervasive control exercised over emergency room doctors should be discounted, respondents argue, or else "all physicians who treat patients at the hospital would be hospital employees." (Opposition at 11.)

There are two answers to that argument. First, if more doctors are classified as employees as a result, that is a function of the hospital exercising employer-type control over them. It cannot maintain such control over the everyday work, function like an employer, and still disclaim the obligations of employer. Second, there are many facets of control; whether a doctor who has privileges at the hospital but is not fully integrated into the workforce, as Dr. Cilecek was, is sufficiently controlled to be an "employee" is a question for the factfinder. Each situation must be judged on its own facts. If Respondents' result-oriented approach were correct, any court could refashion the test and vary the importance of the "control" factor to achieve the result it wanted to achieve. Most importantly, Respondents make Petitioner's argument: in holding that control is less important in the context of the medical profession,

the Fourth Circuit's decision deviates radically from the decisions of this Court and numerous circuit courts that have held that ***the "control" exercised by the hiring individual is the crucial factor***. (*See* cases cited in Petition at 17, n.11.)

It is precisely because employers must exercise more control over "employees" than "independent contractors" that the indicia of "control" are so important to the question of employment status. Other courts considering this issue in the context of the medical profession have recognized this and have not modified the *Darden* test to avoid finding "employee" status. *See, e.g., Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (in examining whether an emergency physician was an 'employee' or an 'independent contractor,' "the central issue . . . is the 'hiring party's right to control the manner and means by which the [work] is accomplished'") (quoting *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1492, 1495-96 (11th Cir. 1993), citing *Community for Creative Non-Violence v. Reid*, 409 U.S. 730, 751 (1989)).

2. Dr. Cilecek has never denied that he agreed to be called an independent contractor, and that he paid his taxes accordingly. Respondents, like the court of appeals, elevate his acquiescence to almost a legally binding admission. They repeatedly refer to his "admission" and his testimony "under oath." (Opposition at 8-10.) But the law is clear that even if the parties had a written contract that declared him an independent contractor, and intended to establish that status, that contract would not govern if, as a matter of workplace reality, the worker functioned like an employee, and the company exercised pervasive, employer-type control over the work. Our petition

cites numerous circuit court decisions holding that the label given to the hired individual does not control. (*See* Petition at 13, n.8 and 15, n.9.) Indeed, those cases make clear that protection under federal remedial statutes, such as Title VII, cannot even be waived. Respondents do not attempt to distinguish any of these cases.

Instead, Respondents simply recite a few factors that they say weighed in favor of independent contractor status. Respondents miss the point entirely. First, they do not address Petitioner's argument that the Fourth Circuit improperly weighed the factors contained in the limited record.[2] Second, in emphasizing the "parties' intent" to create an independent contractor relationship, Respondents, like the Fourth Circuit, erroneously focus solely on the "label" applied by the parties, and ignore the other factors, especially that of control. One need only look at the recited factors to see that either they do not demonstrate independent contractor status, or that the "fact" was disputed and must be read to favor Dr. Cilecek. It was undisputed that Dr. Cilecek worked full time and exclusively for respondents for many years;[3]

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[2] Respondents' argument that Dr. Cilecek failed to preserve any claim that he was denied discovery is specious. (Opposition at 12-13.) The Fourth Circuit did not consider Respondents' argument, and Respondents' argument was not a basis for its decision. The crucial point that Respondents avoid addressing is that the Fourth Circuit improperly weighed the facts in favor of the moving party in contravention of this Court's well-established principle that all inferences must be weighed in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1968).

[3] Respondents argue that Dr. Cilecek was free to work for others. (Opposition at 8.) They fail to state, however, that Dr.

like all emergency room doctors, he proposed a work schedule, which was approved or altered by the hospital; he was paid an hourly rate, like many employees are; he received the employee benefit of malpractice insurance. He did work without close oversight in the exercise of his medical judgment, which was true of all doctors, both "employees" and "independent contractors." In sum, when the Fourth Circuit affirmed summary judgment for defendants before discovery was complete, in the face of the above facts, it gave dispositive effect to the parties' "agreement" that Dr. Cilecek would be called an "independent contractor."

3. One of the most important reasons for granting review in this case is to resolve the conflict between the decision below and the recent decisions of the Ninth and Eleventh Circuits. Respondents' attempts to explain the conflict away are unconvincing.

- *Vizcaino v. Microsoft Corp.*

The brief in opposition devotes a few sentences to the differences between the facts of the decision below and the facts of *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997). (Opposition at 14.) It states, without citation, that "the Ninth Circuit relied heavily on Microsoft's admission as to their employee status." (Opposition at 14.) In fact, regarding Microsoft's "admission," which occurred after the IRS determined that the workers in question were in fact employees, the Ninth Circuit explicitly stated that the concession

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Cilecek had been working full time and exclusively for Respondents for 2 years at the time he was fired (Petition at 3), and they do not explain why this is relevant in any event.

would, "at first blush, appear to dispose of this case. ...If that were all, this would be an exceedingly easy case. Of course, that is not all." *Vizcaino v. Microsoft Corp.*, 120 F.3d at 1010.

The Ninth Circuit painstakingly examined the written agreements between Microsoft and the workers in order to determine whether Microsoft intentionally labeled the workers 'independent contractors' in order to avoid its obligations under federal law or whether the label was a mistake. *Id.* at 1011. These agreements, far more explicit than any understanding between Dr. Cilecek and respondents, explicitly provided that the worker was "'an Independent Contractor for [Microsoft],' and nothing in the agreement should be construed as creating an 'employer-employee relationship.'" *Id.* at 1010. The Ninth Circuit held that, notwithstanding the contractual intent *not* to create an employment relationship, the "Workers performed services for Microsoft **under conditions which made them employees**." *Id.* at 1012 (emphasis added). The same is true of Dr. Cilecek.

- *Garcia v. Copenhaver, Bell & Assoc., M.D.'s, P.A.*

Respondents' attempts to explain away *Garcia v. Copenhaver, Bell & Assoc., M.D.'s, P.A.*, 104 F.3d 1256 (11th Cir. 1997), are similarly unavailing. In attempting to distinguish the case, which also involved an emergency room doctor, they claim that "unlike Dr. Cilecek, Dr. Garcia did not specifically bargain for independent contractor status, did not admit under oath that he intended to be and was an independent contractor and did not work for other emergency medical facilities . . ." (Opposition at 14.) This attempt ignores completely that the contract between Dr. Garcia

and the hospital explicitly provided that he was to perform his duties "as an independent contractor and not as an employee," and that the corporation was to exercise no control over the manner and means in which he performed his duties, which were to be performed in accordance with his "independent medical judgment." *Garcia*, 104 F.3d at 1258. For the Eleventh Circuit, unlike the Fourth Circuit, the explicit intent of the parties is not sufficient to establish independent contractor status. The workplace realities will control.

4. Finally, Respondents attempt to dismiss the negative impact that the Fourth Circuit's decision will have on the Internal Revenue Service (Opposition at 15-16), but notably they ignore the fact that the IRS defines physicians who are fully integrated into the hospital workforce as employees. (Petition at 22, n.17); *see also James v. Commissioner*, 25 T.C. 1296, 1301 (1956) (holding that a hospital pathologist was an employee because he was subject to the "general control of the hospitals" over his work and the "controls over his method of working" required by his profession).[4]

Respondents' argument that Title VII's coverage will not be adversely affected because independent contractors have always been excluded from coverage,

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[4] The impact may be far broader with the increasing practice of contracting out segments of traditional medical care. Questions of Medicare billing by suppliers of medical care arise, and the suppliers of medical care who misclassify emergency physicians as "independent contractors" may be liable for fraudulent billing of Medicare under 42 C.F.R. § 424.80 (1997). This is an issue of great importance to the Health Care Financing Administration, among others.

of course begs the question. (Opposition at 15.) As petitioner, the United States and the EEOC, and *amici* have argued, the Fourth Circuit's decision will make it far easier to establish independent contractor status, which employers have every incentive to do. Unquestionably, such license given to covered employers will adversely affect workers who have heretofore been entitled to protection under a variety of federal remedial and revenue statutes.

Directly responding to the dangers posed to the changing American workforce, the EEOC on December 8, 1997, announced that it had expanded its guidelines on the applicability of federal civil rights laws to cover contingent or temporary workers who contract with employment agencies, large percentages of whom are women and minorities. *See* 1997 Daily Exec. Rep. (BNA) 236, A-21, A-22 (December 9, 1997). Under these guidelines, as long as both the employment agency and the employer that contracts with the employment agency for services have control over a worker and employ the statutory minimum number of workers, they are both liable for violations of the federal civil rights laws as joint employers. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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